BLANK

PAGE

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 339

HENRY S. LONG, CHAIRMAN, AND JOHN P. KOHN, SR., AND W. W. RAMSEY, AS MEMBERS COMPRISING THE STATE TAX COMMISSION OF THE STATE OF ALABAMA, ET AL., APPELLANTS,

vs.

WALTER STOKES, JR., AS COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

FILED SEPTEMBER 10, 1938.

BLANK

PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 339

HENRY S. LONG, CHAIRMAN, AND JOHN P. KOHN, SR., AND W. W. RAMSEY, AS MEMBERS COMPRISING THE STATE TAX COMMISSION OF THE STATE OF ALABAMA, ET AL., APPELLANTS,

vs.

WALTER STOKES, JR., AS COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 8, 1938.

—8873

[fols. 1-3] [Captions omitted]

[fol. 4]

IN CHANCERY COURT OF DAVIDSON COUNTY, AT NASHVILLE, TENNESSEE

PART ONE

ORIGINAL BILL OF COMPLAINT—Filed February 9, 1938

To the Honorable R. B. C. Howell, Chancellor, Holding Part One of the Chancery Court of Davidson County, Tennessee:

The Bill of Complaint of Nashville Trust Company, a banking corporation chartered under the laws of the State of Tennessee, with its principal place of business in Nashville, Davidson County, Tennessee, and Title Guarantee Loan & Trust Company, a banking corporation chartered under the laws of the State of Alabama, with its principal office and place of business in Birmingham, Alabama, Executors of the Estate of Grace C. Scales, deceased, Complainants, [fol. 5] against Walter Stokes, Jr., a resident of Davidson County, Tennessee, Commissioner of Finance and Taxation of the State of Tennessee, and Henry S. Long, Chairman and John P. Kohn, Sr., and W. W. Ramsey, Associates, members of and comprising the State Tax Commission of the State of Alabama, all residents of Montgomery County, Alabama, Defendants,

Complainants respectfully show to the Court as follows:

I

The names and residences of the parties are correctly stated in the caption. The defendant, Walter Stokes, Jr., is the official charged with the duty of collecting all succession or inheritance taxes lawfully due the State of Tennessee; the defendants Henry S. Long, John P. Kohn, Sr., and W. W. Ramsey, comprising the Alabama State Tax Commission, are the officials charged with the duty of collecting succession or inheritance taxes lawfully due the State of Alabama. Complainants are the duly qualified executors of the estate of Mrs. Grace C. Scales, deceased.

Complainants file this suit under Section 8835 to 8847, inclusive, of the Tennessee Code of 1932, known as the [fol. 6] Tennessee Declaratory Judgments Act, for the purpose of obtaining an adjudication as to whether the State of Alabama or the State of Tennessee is entitled to collect inheritance taxes or death transfer taxes on a certain portion of the estate of Mrs. Grace C. Scales, which portion both of said States are seeking to tax.

II

By an instrument dated December 29, 1917, Mrs. Grace C. Scales, a resident of Davidson County, Tennessee, conveyed certain stocks and bonds to complainant, Title Guarantee Loan & Trust Company. By paragraph 1 said Trustee was directed to hold securities having a par value of $50,000.00 in trust for the benefit of Mrs. Scales' daughter, Ann Scales Benedict, for the life of Mrs. Benedict, with remainder on her death to her heirs. Paragraph 2 of said instrument directed the Trustee to hold securities having a par value of $50,000.00 in trust for Mrs. Scales' son, Ellsworth P. Scales, the terms of this trust being the same as those set out in the trust for Mrs. Benedict.

In paragraph 3 of said trust instrument Mrs. Scales directed the said Trustee to hold securities valued at approximately $300,000.00 in trust, the income to be paid to the settlor during her lifetime. Upon her death said securities held by the Trustee under said Paragraph 3 were to be added to and made a part of the two trusts created by [fol. 7] Paragraphs 1 and 2 of said instrument. However, in section (d) of said Paragraph 3 Mrs. Scales reserved to herself the right to authorize and direct any encorachment upon the corpus of the trusts created by said paragraph which she might deem proper; and by Section (b) of paragraph 3 she reserved the right to dispose of the property described in said Paragraph 3 by will. A true and exact copy of said trust instrument is hereto attached and made a part hereof marked Exhibit "A" but need not be copied in issuance of process.

III

By a subsequent instrument dated January 11, 1929, the said Mrs. Scales released and extinguished all of her rights set out in Section (d) of P-ragraph 3 of the trust in-

strument of 1917, referred to above, as to certain bonds of the Pratt Consolidated Coal Company. She reserved to herself, however, the rights under Section (b) of Paragraph 3 of said trust instrument to dispose of said property by will. A true and exact copy of said instrument of January 11, 1929, is attached hereto and made a part hereof, marked Exhibit "B"; but need not be copied in issuance of process.

IV

Thereafter, on or about November 4, 1926, the said Mrs. Scales died a resident of Davidson County, Tennessee, leaving a will and two codicils, which were admitted to probate [fol. 8] in the County Court of Davidson County, Tennessee, on or about November 12, 1936, and are of record in Will Book 53, page 321, of said County Court.

In said will Mrs. Scales appointed complainant, Nashville Trust Company, executor as to such of her property as might be found in Tennessee, and she appointed complainant, Title Guarantee Loan & Trust Company, executor of such of her property as might be found in Alabama. Mrs. Scales chose to exercise the power of disposition of the trusts set up by Paragraph 3 of the trust instrument of 1917, herein referred to, and by her will undertook to dispose of said property as follows;

1. Securities to the value of $100,000 were devised to complainant, Title Guarantee Loan & Trust Company, in trust, the income to be paid to Ann S. Benedict during her life, and after her death the income to be paid to her lineal descendants until twenty-one years after the death of the latest survivor of said lineal descendants living at the time of Mrs. Scales' death, at which time the corpus shall be distributed among said lineal descendants per stirpes.

2. Securities values at $100,000 were devised to complainant, Title Guarantee Loan & Trust Company, in trust for [fol. 9] Ellsworth P. Scales. The terms of this trust are the same as those in the trust for Mrs. Benedict.

3. Securities valued at $13,000.00 were devised to complainant, Title Guarantee Loan & Trust Company, in trust, the income to be paid to Mrs. Scales' granddaughter, Margaret Walton Scales, until said beneficiary reaches the age of twenty-one years, at which time the corpus shall be turned over to her.

After setting up the three trusts mentioned above, Mrs. Scales devised and bequeathed the balance of her property both in Tennessee and Alabama, to certain named persons, all residents of the State of Tennessee.

A true and correct copy of said will and codicil is attached hereto and made a part hereof marked Exhibit C, but need not be copied in issuance of process.

V

On or about November 12, 1936, complainant, Nashville Trust Company, duly qualified in the County Court of Davidson County, Tennessee, as executor of said will, and thereafter, on or about December 3, 1936, complainant, Title Guarantee Loan & Trust Company, qualified as executor of said will in the State of Alabama. Copies of Letters Testa- [fol. 10] mentary issued to both complainants will be filed at or before the hearing.

VI

Complainants aver that thereafter defendants, Henry S. Long, John P. Kohn, Sr., and W. W. Ramsey, acting in their official capacity as the Alabama State Tax Commission, levied and assessed a state inheritance tax or death transfer tax on all of that portion of Mrs. Scales' estate found at the time of her death in the State of Alabama, said property totaling approximately $230,000.00.

Complainants further aver that defendant, Walter Stokes, Jr., acting in his official capacity as Commissioner of Finance and Taxation of the State of Tennessee, had claimed for the State of Tennessee a state inheritance tax or death transfer tax upon the whole of Mrs. Scales' estate, including that portion assessed by the State of Alabama.

VII

Complainants aver that they are ready and willing to pay such taxes as are properly due the State of Tennessee and such taxes as are properly due the State of Alabama; but complainants are advised that they ought not to be compelled to pay inheritance taxes or death transfer taxes upon the same portions of Mrs. Scales' estate to both Tennessee [fol. 11] and Alabama, such taxation being in violation of the Fourteenth Amendment to the Constitution of the United States.

Complainants therefore file this bill under the Tennessee Declaratory Judgments Act referred to above, for the purpose of having determined what taxes it should pay to the State of Tennessee and what taxes it should pay to the State of Alabama. Complainants aver that all parties interested in the determination of this question have been joined as parties hereto.

Complainants are advised and aver that defendants, Henry S. Long, John P. Kohn, Sr., and W. W. Ramsey, members of and comprising the State Tax Commission of the State of Alabama, have agreed voluntarily to enter an appearance and to invoke the jurisdiction of this Honorable Court in this case for the purpose of having the rights of the State of Alabama as well as the rights of the State of Tennessee adjudicated in one proceeding.

VIII

Premises considered, complainants pray:

1. That process issue to compel defendant, Walter Stokes, Jr., Commissioner of Finance & Taxation of the State of [fol. 12] Tennessee, to appear and answer this bill, but not under oath, the oath being hereby expressly waived: and

2. That at the hearing the Court determine what portions of the estate of Mrs. Grace C. Scales, deceased, are taxable by the State of Tennessee, and what portions of said estate are taxable by the State of Alabama; and

That complainants have such other, further, and general relief as they may be entitled to receive in the premises.

Chas. C. Trabue, Jr., Trabue, Hume & Armistead,
Solicitors for Complainants.

We will be surety for costs: Trabue, Hume & Armistead, by Chas. C. Trabue, Jr.

[fol. 13] EXHIBIT "A" TO ORIGINAL BILL

STATE OF ALABAMA,
Jefferson County:

This Indenture Made and Entered into by and between Grace C. Scales and the Title Guarantee Loan & Trust Com-

pany, a body corporate under the laws of Alabama, as trustee,

Whereas, Grace C. Scales owns certain stock and bonds that she desires to place in trust with the Title Guarantee Loan & Trust Company, as trustee under the terms hereof.

Now in Consideration of the Premises, and in consideration of One ($1.00) Dollar to the undersigned Grace C. Scales in hand paid by the Title Guarantee Loan & Trust Company, trustee, receipt whereof is hereby acknowledged, and the further consideration of the Title Guarantee Loan & Trust Compnay as trustee agreeing to do and perform the duties herein imposed upon the said Title Guarantee Loan & Trust Company, as trustee, by this instrument,

Par. 1. The undersigned Grace C. Scales does by these presents grant, sell, transfer, assign and deliver to the Title Guarantee Loan & Trust Company, trustee Fifty (50) [fol. 14] bonds issued by the Pratt Consolidated Coal Company numbered one (1) to fifty (50), both inclusive, each of said bonds being for $1,000.00, each bearing date as of the 1st day of April, 1905, each bearing interest at the rate of 5% per annum, payable semi-annually, with coupons due July 1st, 1918, and all subsequent coupons attached, each of said bonds being secured by mortgage or deed of trust referred to in said bonds. These Fifty bonds, the Title Guarantee Loan & Trust Company, as trustee, and hereinafter called trustee, is to hold in trust for the uses and benefit of Ellsworth P. Scales, upon the following trusts and conditions to wit:

(a) The trustee is to hold, manage and look after the said trust property, and shall pay over the net income and profits therefrom to the said Ellsworth P. Scales, during his life, or to whomsoever he may in writing direct.

If at any time during the life of the said Ellsworth P. Scales, the income and profits of the trust property received by him from this trust is in his opinion insufficient for his comfortable support and maintenance, he may in writing direct the trustee to sell and dispose of such portion of such property as he sees fit, in which event it shall be the duty of the trustee to sell and dispose of the property as directed in writing, and pay over the amount received [fol. 15] therefrom to the said Ellsworth P. Scales.

The said Ellsworth P. Scales may at any time he sees fit, direct the trustee to sell the trust property, or any part

thereof, for reinvestment and reinvest the proceeds in such other property or investment, as he may in writing direct, and in like manner, change the investment as often as directed by the said Ellsworth P. Scales.

(b) The trustee is to be entitled to 5% per annum on the income received by it from this trust property, or the proceeds thereof as compensation to it for its services to be deducted by the trustee from the income as received, and from the income is to pay all taxes or *or* other charges, if any, necessary to the preservation and protection of the trust property, and the net income as and when received to be paid over to Ellsworth P. Scales.

(c) Ellsworth P. Scales may, at any time he sees fit, remove the Title Guarantee Loan & Trust Company from the trusteeship in regard to the property held in trust for him, and appoint a substituted trustee, and in like manner, may remove any trustee as often as he sees fit, and appoint a substituted trustee, such removal to be made by his notifying in writing the trustee of its removal, and in said writ-[fol. 16] ing, notify the trustee who he has appointed as a substituted trustee. Upon receiving such notice of removal and appointment of substituted trustee, the Title Guarantee Loan & Trust Company, or any other trustee, shall at once surrender to the substituted trustee all of the property then held by it under this trust for Ellsworth P. Scales.

Any substituted trustee shall take, hold, manage and dispose of the property received by it under this trust under the terms and provisions of this trust in the same manner as the Title Guarantee Loan & Trust Company is to receive, hold, and manage such property, provided, however, that no trustee can be removed until all earned compensation has been paid to it, and until all taxes and other charges, if any, for which the trust is liable, is paid.

(d) At the death of Ellsworth P. Scales, all trust property then belonging to the trust, shall go to the child or children of Ellsworth P. Scales, share and share alike, and as to such of said children as are under the age of twenty-one years, the share shall be delivered to the legal guardian or representative of such minor, provided, however, that Ellsworth P. Scales shall have the power and authority by will to dispose of and direct the disposition of the property

then belonging to and held under this trust, in which event the trustee shall deliver the property as directed by said [fol. 17] will. The distribution and division between the children of Ellsworth P. Scales is only in the event he leaves no will, or makes no disposition of property held under this trust, by will, and in the event Ellsworth P. Scales dies leaving no will and leaves no children or lineal descendants, the trust property, if any, held under this trust at the time of his death, is to go to his leagl heirs.

Par. 2. The undersigned, Grace C. Scales, does by these presents grant, sell, transfer, assign and deliver to the Title Guarantee Loan & Trust Company, trustee, fifty (50) bonds issued by the Pratt Consolidated Coal Company numbered fifty-one (51) to one hundred (100), both inclusive, each of said bonds being for One Thousand Dollars, each bearing date as of the first day of April, 1905, each bearing interest at the rate of 5% per annum, payable semi-annually, with coupons due July 1st, 1918, and all subsequent coupons attached, each of said bonds being secured by mortgage or deed of trust referred to in said bonds. These Fifty bonds the Title Guarantee Loan & Trust Company, as trustee, and hereinafter called trustee, is to hold in trust for the use and benefit of Anne S. Benedict, upon the following trusts and conditions, to wit:

(a) The trustee is to hold, manage and look after the said trust property and shall pay over the net income and profits [fol. 18] therefrom to the said Anne S. Benedict during her life, or to whomsoever she may, in writing, direct.

If at any time during the life of the said Anne S. Benedict the income and profits of the trust property received by her from this trust is in her opinion insufficient for her comfortable support and maintenance, she may in writing direct the trustee to sell and dispose of such portion of such property as she sees fit, in which event it shall be the duty of the trustee to sell and dispose of the property as directed in writing, and pay over the amount received therefrom to the said Anne S. Benedict.

The said Anne S. Benedict may at any time that she sees fit, direct the trustee to sell the trust property, or any part thereof for reinvestment, and reinvest the proceeds in such other property, or investment as she may in writing direct, and in like manner change the investment as often as directed by the said Anne S. Benedict.

(b) The trustee is to be entitled to 5% per annum on the income received by it from this trust property, or the proceeds thereof, as compensation to it for its services to be deducted by the trustee from the income as received and from the income is to pay all taxes or other charges, if any, necessary to the preservation and protection of the trust [fol. 19] property, and the net income as and when received is to be paid over to Anne S. Benedict.

(c) Anne S. Benedict may, at any time she sees fit, remove the Title Guarantee Loan & Trust Company from the trusteeship, in regard to the property held in trust for her, and appoint a substituted trustee, and in like manner may remove any trustee as often as she sees fit, and appoint a substituted trustee, such removal to be made by her notifying the trustee in writing of its removal, and in said writing, notify the trustee who she has appointed as a substituted trustee. Upon receiving such notice of removal and appointment of substituted trustee, the Title Guarantee Loan & Trust Company, or any other trustee, shall at once surrender to the substituted trustee all of the property then held by it under this trust for Anne S. Benedict.

Any substituted trustee shall take, hold, manage and dispose of the property received by it under this trust under the terms and provisions of this trust in the same manner as the Title Guarantee Loan & Trust Company is to receive, hold and manage such property, provided, however, that no trustee can be removed until all earned compensation has been paid to it, and until all taxes and other charges, if any, for which the trust is liable, is paid.

[fol. 20] (d) At the death of Anne S. Benedict, all trust property then belonging to the trust shall go to the child or children of Anne S. Benedict, share and share alike, and as to such of said children as are under the age of twenty-one years, the share shall be delivered to the legal guardian or representative of such minor, provided, however, that Anne S. Benedict shall have the power and authority by will to dispose of, and direct the disposition of the property then belonging to and held under this trust, in which event the trustee shall deliver the property as directed by said will. The distribution and division between the children of Anne S. Benedict is only in the event she leaves no will, or makes no disposition of property held under this trust, by will, and in the event Anne S. Benedict dies leaving

no will and leaving no children or lineal descendants, the trust property, if any, held under this trust, at the time of her death, is to go to her legal heirs.

All property and income to which Anne S. Benedict is entitled to under the provisions of this instrument, is to be for her sole and separate use, and free from any rights, interests or control in her present, or any future, husband.

Par. 3. The undersigned, Grace C. Scales, does by these presents grant, sell, transfer, assign and deliver to the Title Guarantee Loan & Trust Company, trustee, the following [fol. 21] stocks and bonds, to wit:

Bonds issued by the Pratt Consolidated Coal Company, numbered one hundred and one (101) to two hundred and thirty-one (231), both inclusive and six hundred and eighty-seven (687) to seven hundred (700), both inclusive, and eight hundred and sixteen (816) and eight hundred and seventeen (817) and thirty-two hundred and thirty-three (3233) to thirty-two hundred and forty-five (3245), both inclusive, and thirty-three hundred and fifty-nine (3359) and thirty-three hundred and seventy-nine (3379) to thirty-three hundred and eighty-seven (3387), both inclusive, and bonds numbered twenty-seven hundred and eighty (2780) to twenty-seven hundred and nine-y-one (2791), both inclusive, and bonds numbered seven hundred and one (701) to seven hundred and fifty-eight (758), both inclusive, each of said bonds being for one thousand dollars, each bearing date as of the first day of April 1905, each bearing interest at the rate of 5% per annum, payable semi-annually, with coupons due July 1st, 1918, and all subsequent coupons attached, each of said bonds being secured by mortgage or deed of trust referred to in said bonds.

And Twenty-four bonds issued by Birmingham Railway & Electric Company, each for One Thousand Dollars, each bearing interest at the rate of 5% per annum, payable semi-[fol. 22] annually, said bonds being numbered nine hundred and twenty-seven (927) to nine hundred and fifty (950) both inclusive, with coupons due July 1st, 1918, and all subsequent coupons attached.

Also Thirty-four shares of stock, each for One Hundred Dollars, issued by Fulton Mining Company, and evidenced by certificate No. 71.

Also Sixty-three and ⅓ (63⅓) shares of the capital stock of Empire Mining Company, each share being for One Hundred Dollars, and evidenced by Certificate No. 30.

Also two (2) notes, executed by Empire Mining Company to Grace C. Scales, one for Twenty-Four Hundred and Eighty-Nine and 71/100 ($2489.71) Dollars, and one for Three Hundred and Forty-seven and 70/100 ($347.70) Dollars.

Also Nine shares of stock, each for one Hundred Dollars, issued by Ellsworth Ore Company, (Inc.) evidenced by certificate No. 6.

Also twenty shares of stock issued by Birmingham Trust & Savings Company, each for $100.00 evidenced by certificate No. 1173.

[fol. 23] Also six shares of stock, each for $100.00 issued by Avondale Mills, evidenced by certificate No. 828.

Also forty one shares of preferred stock issued by Birmingham Railway, Light & Power Company, evidenced by certificate No. 3425.

Also forty-two shares of the capital stock of the Ensley Land Company, thirty-nine shares being evidenced by certificate No. 2499, and three shares being evidenced by certificate No. 2320.

Also fractional shares of stock in the Ensley Land Company to the amount of Twenty ($20.00) Dollars, evidenced by certificate No. 274, and to the amount of Fifty-five ($55.00) Dollars evidenced by certificate No. 386, these certificates being certificates of ownership in fractional shares.

One note for Twenty-five Thousand ($25,000) Dollars, executed by William Hood, and secured by deed of trust, being dated May 1st, 1915, due May 1st, 1920, bearing interest from date at the rate of 6% per annum, payable semi-annually, with coupons due May 1st, 1918, and all subsequent coupons attached.

In trust for the following uses and purposes:

[fol. 24] (a) The Title Guarantee Loan & Trust Company, as trustee shall hold, manage and look after said property, and shall pay over to the undersigned Grace C. Scales, during her life, the net income, rents and profits therefrom, such net income, rents and profits to be paid over to the said Grace C. Scales, as often as received by the Title Guarantee Loan & Trust Company as trustee.

(b) Grace C. Scales reserves, and shall have the right, to dispose of all trust property in the custody of the trustee under paragraph three of her last will and testament, and if she makes disposition by last well and testament, then the

trust property is to be handled and disposed of as directed in said will.

(c) In the event Grace C. Scales makes no disposition of the trust property covered by this paragraph three of her last will and testament, then if D. C. Scales, the husband of Grace C. Scales, is living, the trustee is to pay over from the net income of the trust property, to D. C. Scales, for and during the term of his life, Two Hundred Dollars per month, and the balance of the net income the trustee is to pay over to Ellsworth P. Scales, the son, and Anne S. Benedict, the daughter of Grace C. Scales, during their lives, the child or children of Ellsworth P. Scales, if he be dead, or of Anne S. [fol. 25] Benedict, if she be dead, to receive the share of the income which the parent would have received if living, and subject to the charge on the income in favor of D. C. Scales. One-half of the trust property in the custody of the trustee, under this paragraph of the trust, at the death of Grace C. Scales, is to be transferred to the trust herein created for Ellsworth P. Scales, by paragraph one hereof, with the same powers, rights and duties and to be held under the same provisions and conditions as the trust in favor of Ellsworth P. Scales under Paragraph One hereof.

One-half of the trust property in the custody of the trustee, under this paragraph of the trust, at the death of Grace C. Scales, is to be transferred to the trust herein created for Anne S. Benedict, by paragraph two hereof, with the same powers, rights and duties and to be held under the same provisions and conditions as the trust in favor of Anne S. Benedict under paragraph two hereof.

(d) If at any time during the life of the undersigned Grace C. Scales, the net income and profits of the property coming into the hands of the trustee under paragraph three of this instrument, are in her opinion insufficient for her comfortable support and maintenance, she may, in writing, direct the Title Guarantee Loan & Trust Company, as trustee, to sell and dispose of such portion of the said trust property as she sees fit, in which event, it shall be the duty [fol. 26] of the trustee to sell and dispose of the property as directed, and pay over to her the amount received therefrom.

The said Grace C. Scales may, at any time she sees fit, in writing direct the trustee to transfer and deliver to either Ellsworth P. Scales, or Anne S. Benedict, her children, such

portion of the property in the hands of the trustee under this instrument, as she deems fit, relieved from any trust under this instrument, in which event, it shall be the duty of the trustee to follow the written direction of said Grace C. Scales, and transfer and deliver the property as directed to either of said children.

(e) Grace C. Scales shall have the right in writing to direct the trustee to sell any or all of the property received by it under this instrument, and reinvest the proceeds in other property, and in like manner, direct the trustee to change the investment by selling and reinvesting as often as she deems fit, and it shall be the duty of the trustee to make sales and reinvestments as often as directed by the said Grace C. Scales, all property acquired by any reinvestment to be held under the terms and conditions of the trust created by this paragraph.

Par. 4. In regard to the trust created in favor of Ells- [fol. 27] worth P. Scales, by paragraph one hereof, he may, at any time he sees fit, remove the Title Guarantee Loan & Trust Company from the trusteeship created by paragraph one, and appoint a substituted trustee and in like manner, remove any trustee as often as he sees fit, and appoint a substituted trustee, such removal to be made by notifying the trustee in writing of its removal, and stating the trustee appointed as substituted trustee, and

In like manner, Anne S. Benedict may remove the Title Guarantee Loan & Trust Company, as trustee, and appoint a substituted trustee, and change the trustee as often as desired in regard to the trust created by paragraph two of this instrument, and

In like manner Grace C. Scales may remove the trustee and appoint a substituted trustee as often as she sees fit as regards the trust created by paragraph three of this instrument.

Any substituted trustee as to either of the trusts created by this instrument, shall take, hold, manage and dispose of the property received by it under the terms of the trust as created by this instrument, and upon receiving notice of the removal and appointment of a substituted trustee as to either of the trusts created by this instrument, the Title [fol. 28] Guarantee Loan & Trust Company, or any other Trustee, shall at once surrender to the substituted Trustee, all of the property then held by it under the special trust.

Par. 5. Ellsworth P. Scales as to the trust created by Paragraph One, and Anne S. Benedict as to the trust created by Paragraph Two, and Grace C. Scales, as to the trust created by Paragraph Three, shall have the right, at any time, to require the Title Guarantee Loan & Trust Company, or any substituted trustee, to give bond in such amount as he or she may direct, with some guaranty company to be approved by him or her, as surety thereon, the bond to be so conditioned and payable as to guarantee that the trustee will perform all of the obligations imposed upon the trustee by the terms of the trust and faithfully account for and manage the property received by it under the trust, the premium cost and expenses of such bond to be paid out of the income from the trust property, or the trust property in the hands of the trustee.

Par. 6. The Title Guarantee Loan & Trust Company shall receive as full compensation for its services, in the execution of the trust created by Paragraph One hereof, an amount equal to and at the rate of 5% per annum, on the income received by it from the trust estate, and in like manner 5% of the income received by it on the trust estate [fol. 29] created by Paragraph Two, and in like manner 5% of the income received by it from the trust created by Paragraph Three hereof, and any substituted trustee shall receive similar compensation for services unless, at the time of the appointment of a substituted trustee by agreement of the trustee, and the party appointing the amount of the compensation is changed, all compensation to the trustee under the terms of either of the trusts herein created, shall be deducted by the trustee from the income as received.

Par. 7. In the event any litigation shall arise in regard to the trust property during the existence of either of the trusts hereby created, the trustee shall employ such attorney to represent the trust estate as the beneficiaries under the trust may direct, the cost and expense of such litigation to be a charge upon the trust estate in litigation.

Par. 8. The trustee is directed to pay all costs and expense, including tax, if any, that it may be necessary to pay, in order to protect the trust property, and deduct the same from the net income coming in from the property under the trust for which the expenditure is made.

Par. 9. The Title Guarantee Loan & Trust Company hereby accepts the trusts created and imposed by this instrument, and agrees to execute and discharge each of the [fol. 30] trusts in accordance with the terms hereof.

Par. 10. As to the net income which Ellsworth P. Scales is entitled to under the trust created by Paragraph One hereof, the trustee shall, as and when received, deposit the same to his credit in the First National Bank of Birmingham, until directed otherwise by Ellsworth P. Scales.

As to the net income which Anne S. Benedict is entitled to under the trust created by Paragraph Two hereof, the trustee shall, as and when received, deposit the same to her credit in the First National Bank of Birmingham, until directed otherwise by Anne S. Benedict.

In Witness Whereof, the said Grace C. Scales and the Title Guarantee Loan & Trust Company, by its President, E. J. Smyer, who is duly authorized to execute this instrument, hereunto set their signatures and seals, and each of the six preceding pages of this instrument have been identified by Grace C. Scales and E. L. Smith by their writing their names on the margin of each page in quadruplicate, this 29th day of December, 1917.

Grace C. Scales. (L. S.) Title Guarantee Loan & Trust Company, Trustee, by E. J. Smyer (L. S.), President. (Seal.)

[fol. 31] EXHIBIT "B" TO ORIGINAL BILL

This Instrument Witnesseth: That whereas by the provisions of paragraph 3 of a certain trust indenture bearing date December 29, 1917, to which reference is here made, Grace C. Scales, of Nashville, Tennessee, conveyed and delivered to Title Guarantee Loan & Trust Company, of Birmingham, Alabama, as Trustee, certain securities and notes therein fully described (including the two hundred bonds hereinafter referred to) in trust to pay over the net income to her during her life, with certain dispositions over upon her death, but in the event only that she did not otherwise dispose of said trust estate by her last will and testament; and

Whereas, in section (d) of said Paragraph 3 there were reserved to her the right and power, if such income accruing to her should in her opinion be or become insufficient for her comfortable support and maintenance, to call on the Trustee to sell such portion of said trust property as she might see fit, and to turn over the proceeds thereof to her; and

Whereas, in said section (d) of said Paragraph 3 there were further reserved to her the right and power at any time to require the Trustee to deliver to either Ellsworth [fol. 32] P. Scales or Anne S. Benedict, her children, such portion of the trust property as she might see fit, relieved from any trust under said instrument; and

Whereas, the exercise by the said Grace C. Scales of either of said two powers, which were conferred by her on herself to be exercised solely in her discretion, would to that extent diminish the corpus of said trust estate that is to pass after her death to those who may be or become thereunto entitled after her; and

Whereas, for these reasons she wishes now to efface and extinguish the powers given her in said section (d) of Paragraph 3 of said trust indenture in so far as they relate to or can in any wise affect a certain two hundred (200) bonds described in said trust indenture and now held in said trust, or any other property or security into which said two hundred bonds or any part of them may be converted by sale and reinvestment, and her said two children agree and consent that she may do so—the said two hundred (200) bonds being as follows:

Bonds issued by the Pratt Consolidated Coal Company numbered vix:

Numbers One Hundred and One (101) to Two Hundred and Thirty-One (231) both inclusive, in all	131
Numbers Seven Hundred and One (701) to Seven Hundred and Fifty-Eight (758), both inclusive, in all	58
[fol. 33] Numbers Eight Hundred and Sixteen (816) and Eight Hundred and Seventeen (817)	2
Numbers Three Thousand Three Hundred and Seventy-nine (3379) to Three Thousand Three Hundred and Eighty-Seven (3387), both inclusive, in all	9
	200

Now, Therefore, the Said Grace C. Scales, in Consideration of the Premises and of the love and affection she has for those who shall become entitled to the benefits of said trust estate after her, hereby releases and relinquishes to said Title Guarantee Loan & Trust Company, Trustee, all of the authority and powers reserved to her in said section (d) of said trust indenture in so far as relates to the above two hundred (200) bonds of Pratt Consolidated Coal Company or any reinvestment of them or any part of them (but not as to any other of the property in said trust), so as to that extent to efface and extinguish said authority and powers and so as that said Trustee will hold and administer said bonds or any reinvestment of them free and discharged from the limitations contained in said section (d); and the said Ellsworth P. Scales and Anne S. Benedict hereby ratify and confirm this instrument and release and relinquish any and all right of benefit they might have in the powers herein extinguished.

The Title Guarantee Loan & Trust Company, of Birming-[fol. 34] ham, the Trustee named in the said trust indenture, herewith formally assents to the foregoing modification of said trust, and in evidence of its assent thereto joins in the execution of this instrument.

In Witness Whereof, the said Grace C. Scales, Ellsworth P. Scales, and Anne S. Benedict, and likewise the Title Guarantee Loan & Trust Company, by its President E. J. Smyer, who is duly authorized to execute this instrument, hereunto set their signatures and seals on this the third page of this instrument, and each of the two preceding pages has been identified by Grace C. Scales and by E. L. Smith (Treasurer of said Trust Company), by their writing their names on the margins hereof, in duplicate, this 11th day of January, 1929.

Grace C. Scales, Ellsworth P. Scales, Anne S. Benedict, Title Guarantee Loan & Trust Company, by E. J. Smyer, President.

[fol. 35] EXHIBIT "C" TO ORIGINAL BILL

I, Mrs. Grace C. Scales, of Nashville, Tennessee, being of sound mind and disposing memory, do make and declare

this to be my last will and testament, hereby revoking all former wills by me at any time made.

Item One

For the reason that I own property in the State of Tennessee, and that there is property situated in the State of Alabama which I have the right to dispose of my last will and testament, it will be necessary to appoint an executor of this will for each of said states.

Accordingly, I appoint the Nashville Trust Company, a corporation of Nashville, Davidson County, Tennessee, as executor of this will as to all property which I may own in the State of Tennessee at the time of my death; and I appoint the Title Guarantee Loan & Trust Company, a corporation of Birmingham, Alabama, as executor of this will as to all property which I may own in the State of Alabama and also as to all property which I may have the right to dispose of by last will and testament in said state.

Item Two

In paragraph three (3) of a trust agreement dated De- [fol. 36] cember 29, 1917, executed by and between myself and the said Title Guarantee Loan & Trust Company, Birmingham, Alabama, I conveyed to the said company as trustee certain property to be held upon the uses and trusts set forth in said agreement; and said agreement contains the following provisions:

"Grace C. Scales reserves and shall have the right to dispose of all trust property in the custody of the trustee under paragraph three (3) by her last will and testament, and if she makes disposition by last will and testament, then the trust property is to be held and disposed of as directed in said will."

Now, therefore, desiring to exercise the right to dispose of the said trust property, I do hereby give, devise and bequeath all of the property in custody of said Title Guarantee Loan & Trust Company under the terms of item or paragraph three (3) of said trust agreement at the time of my death to the said company, as trustee, the same to be held by it in trust upon the uses and trusts, terms, conditions, and limitations hereinafter set forth in this item of my will.

Section One. From the said trust property in the hands of the trustee under paragraph three (3) of said trust agreement there shall be set aside property of the value of [fol. 37] One Hundred Thousand ($100,000.00) Dollars, which shall constitute a trust estate to be held by the said trustee in trust upon the uses and trusts, terms, conditions and limitations hereinafter set forth in this section of my will.

If at the time of my death there shall be in the hands of the said trustee under paragraph three (3) of said trust agreement bonds of the Pratt Consolidated Coal Company, a corporation organized under the laws of the State of Delaware, and having its principal office in Birmingham, Alabama, of the par value of Two Hundred Thousand ($200,000.00) Dollars, the said trust estate shall be made up of said bonds, the same to be valued at par.

However, if at the time of my death there shall not be in the hands of the said trustee under said paragraph three (3) of said trust agreement bonds of the said Pratt Consoli- [fol. 38] dated Coal Company of the par value of Two Hundred Thousand ($200,000.00) Dollars, then the said trust estate shall be made up of one-half (½) of such of said bonds as may be in the hands of the trustee, the same to be valued at par, and the balance of said trust estate shall be made up of such other of the trust property in the hands of the trustee under said paragraph three (3) of said trust agreement as it may determine.

If at the time of my death there shall be no bonds of the said Pratt Consolidated Coal Company in the hands of the trustee under paragraph three (3) of said trust agreement, then the said trust estate shall be made up entirely of such other of the trust property in the hands of the said trustee under said paragraph three (3) of said trust agreement as it shall determine.

[fol. 39] The said trust estate shall be held in trust by the said trustee for my daughter, Mrs. Ann S. Benedict, of Nashville, Tennessee, for and during her life, during which time the entire net income arising therefrom shall be paid over to her, subject however to an annuity of Twenty-five Hundred ($2500.00) Dollars per year which shall first be paid by the said Trustee out of said net income to my husbond, D. C. Scales, for and during his life.

Upon the death of my said daughter, Mrs. Ann S. Benedict, the said trust property shall continue to be held in

trust by the said trustee for such of her children as are then living, share and share alike, the share of each such child to be held in trust for him or her for and during his or her life, during which time the entire net income arising therefrom shall be paid to him or her, except that during the minority of any child the income arising from his or her share shall be used by the trustee for his or her maintenance, education, and support; provided, however, that the lineal descendants of any deceased child of the said Mrs. Ann S. Benedict, living at her death, shall take the share per stirpes their parent would have taken if living at her death, the portion of each such lineal descendant to be held in trust by the said trustee for and during his or her life; during which time the entire net income arising therefrom shall be paid over to him or her, except that during the minority of any [fol. 40] such lineal descendant the said net income shall be used by the trustee for his or her maintenance, education, and support; provided, further, however, that if my husband, D. C. Scales, shall be living at the time of the death of my said daughter, then and in that event the said trustee shall continue to pay to him for and during his life the sum of Twenty-five Hundred ($2500.00) Dollars per year; provided, further, however, that if Andrew B. Benedict, the husband of my said daughter, shall be living at the time of her death, then and in that event the said trustee shall pay to him for and during his life one-fourth (¼) of the entire net income arising from said trust property.

For and during the continuation of this trust as to all or any part of said trust property the said trustee shall hold, manage, and control the same, and collect and receive the income arising therefrom.

For and during the continuation of this trust as to all or any part of said trust property the said trustee may sell all or any part of the same and reinvest the proceeds of sale, such sales and reinvestments to be made when and in the manner and upon such terms as it may deem best, provided, that the same shall be done only with the written consent of my said daughter, Mrs. Ann S. Benedict, for and during [fol. 41] her life.

My intention and purpose in creating the said trusts is to provide a certain and sure income for the maintenance and support of all beneficiaries therein named, and of each of them; and each and every of the said beneficiaries shall have no power to anticipate, mortgage, assign, sell, or in

any way alienate either the corpus of the estate held in trust for them or any of them, or the income arising therefrom, during the continuation of the trust; and neither the said trust property, nor any part thereof, either corpus or income, while the same is held in trust by the trustee for the said beneficiaries, or any of them, shall be subject to execution, or other legal process for any debt or liability any one or all of said beneficiaries may contract or incur; and the interest of each and every female beneficiary shall be held for her sole and separate *sue*, free from the debts, contracts, control and all marital rights of any husband she may ever at any time have.

Section Two. From the said trust property in the hands of the Trustee under paragraph three (3) of said trust agreement there shall be set aside property of the value of One Hundred Thousand ($100,000) Dollars, which shall constitute a trust estate to be held by the said trustee in trust upon the uses and trusts, terms, conditions, and limita-
[fol. 42] tions hereinafter set forth in this section of my will.

If at the time of my death there shall be in the hands of the said trustee under paragraph three (3) of said trust agreement bonds of the Pratt Consolidated Coal Company, a corporation organized under the laws of the State of Delaware, and having its principal office in Birmingham, Alabama, of the par value of Two Hundred Thousand ($200,000) Dollars, the said trust estate shall be made up of said bonds, the same to be valued at par.

However, if at the time of my death there shall not be in the hands of the said trustee under said paragraph three (3) of said trust agreement bonds of the said Pratt Consolidated Coal Company of the par value of Two Hundred Thousand ($200,000) Dollars, then the said trust estate shall be made up of one-half (½) of such of said bonds as may be in the hands of the trustee, the same to be valued at par, and the balance of said trust estate shall be made up of such other of the trust property in the hands of the trustee under said paragraph three (3) of said trust agreement as it may determine.

If at the time of my death there shall be no bonds of the said Pratt Consolidated Coal Company in the hands of the
[fol. 43] trustee under paragraph three (3) of said trust agreement, then the said trust estate shall be made up en-

tirely of such other of the trust property in the hands of the said trustee under said paragraph three (3) of said trust agreement as it shall determine.

The said trust estate shall be held in trust by the said trustee for my son Ellsworth P. Scales, of Nashville, Tennessee, for and during his life, during which time the entire net income arising therefrom shall be paid over to him, subject however to an annuity of Twenty-five Hundred ($2500) Dollars per year which shall first be paid by the said trustee out of said net income to my husband, D. C. Scales, for and during his life.

Upon the death of my said son, Ellsworth P. Scales, the said trust property shall continue to be held in trust by the said trustee for such of his children as are then living, share and share alike, and share of each such child to be held in trust for him or her and during his or her life, during which time the entire net income arising therefrom shall be paid to him or her, except that during the minority of any child the income arising from his or her share shall be used by the trustee for his or her maintenance, education, and support; provided, however, that the lineal descendants of any de- [fol. 44] ceased child of the said Ellsworth P. Scales, living at his death, shall take the share per stirpes their parent would have taken if living at his death, the portion of each such lineal descendant to be held in trust by the said trustee for and during his or her life, during which time the entire net income arising therefrom shall be paid over to him or her, except that during the minority of any such lineal descendant the said net income shall be used by the trustee for his or her maintenance, education, and support; provided, further, however, that if my husband, D. C. Scales, shall be living at the time of the death of my said son, then, and in that event the said trustee shall continue to pay to him for and during his life the sum of Twenty Five Hundred ($2500) Dollars per year; provided, further, however, that, if Margaret Scales, the wife of my said son, shall be living at the time of his death, then and in that event the said trustee shall pay to her for and during her life one-fourth (¼) of the entire net income arising from said trust property.

For and during the continuation of this trust as to all or any part of said trust property, the said trustee shall hold, manage, and control the same, and collect and receive the income arising therefrom.

For and during the continuation of this trust as to all [fol. 45] or any part of said trust property the said trustee shall hold, manage and control the same, and collect and receive the income arising therefrom.

For and during the continuation of this trust as to all or any part of said trust property the said trustee may sell all or any part of the same and reinvest the proceeds of sale, such sales and reinvestments to be made when and in the *nammer* and upon such terms as it may deem best, provided that the same shall be done only with the written consent of my said sone, Ellsworth P. Scales, for and during his life.

My intention and purpose in creating the said trusts is to provide a certain and sure income for the maintenance and support of all beneficiaries therein named, and of each of them; and each and every of the said beneficiaries shall have no power to anticipate, mortgage, assign, sell or in any way alienate either the corpus of the estate held in trust for them or any of them, or the income arising therefrom, during the continuation of the trust, and neither the said property, nor any part thereof, either corpus or income, while the same is held in trust by the trustee for the said beneficiaries, or any of them, shall be subject to execution, or other le*ag*l process for any debt or liability any one or all of said beneficiaries may contract or incur; and the interest of each and every female beneficiary shall be held for her sole and separate use, free from the debts, contracts, control and all marital rights of any husband she may ever at any time have.

Section Three. After the trust property of the value of One [fol. 46] Hundred Thousand ($100,000) Dollars shall be set aside as provided above in Section One, and after the trust property of the value of One Hundred Thousand ($100,000) Dollars shall have been set aside as above provided in Section Two, the balance of said trust property in the hands of the said trustee under paragraph three (3) of said agreement at the time of my death shall be paid and delivered in equal shares to my said daughter, Mrs. Ann S. Benedict, and to my said son, Ellsworth P. Scales, to be theirs absolutely.

Item Three. My Tennessee Executor shall pay all administration expenses and debts on account of property

situated in Tennessee out of the assets coming into its hands.

My intention is to give to the Old Woman's Home, of Nashville, Tennessee, the sum of Three Thousand ($3000) Dollars, however, if I shall fail to do so before my death, I give to the Old Woman's Home out of my Tennessee assets the sum of Three Thousand ($3000) Dollars, or such part of said sum as I shall fail to give during my life.

All the rest and residue of the property which I may own in Tennessee at the time of my death, real, personal and mixed, I give in equal shares of one-half each to my daughter, [fol. 47] Mrs. Ann S. Benedict, and to my son, Ellsworth P. Scales; provided, however, that my said Tennessee executor is authorized and empowered, before making a division of said property between my said two children, to sell all or any part of the same, either real or personal or both, and to divide the proceeds equally between my said two children, if it in its judgment deems it best to do so.

Item Four. I give, devise, and bequeath unto my said daughter, Mrs. Ann S. Benedict, and to my said son, Ellsworth P. Scales, in equal shares of one-half (½) each, any other property situated in the State of Alabama which I may own at the time of my death, and which I have not hereinabove in this will already disposed of; provided, however, that my said Alabama executor is authorized and empowered, before making a division of my said property between my said two children, to sell or any part of the same, either real or personal or both, and to divide the proceeds equally between my said two children, if it in its judgment deems it best to do so.

In Witness Whereof, I have executed this as my last will and testament this January 1, day of —, 1926.

(Signed) Mrs. Grace C. Scales.

Signed by the said Mrs. Grace C. Scales as and for her [fol. 48] last will and testament in the presence of us, the undersigned, who, at her request, and in her sight and presence, and in the presence of each other have hereunto signed our names as attesting witnesses this 1st day of January 1926.

(Signed) L. A. Anderson. A. T. Jones.

[fol. 49] I, Grace C. Scales, of Nashville, Tennessee, make this as a first codicil to my last will and testament dated January 1, 1926.

Item I. In Item Two, Section 1, of my will I created a trust for the benefit of my daughter, Mrs. Anne S. Benedict, to pay over the income to her during her life, and on her death the income to be paid over to her children or descendants of her children per stirpes. It is my purpose, and I now direct, that said trust for my daughter Anne shall continue until twenty-one years after the death of the last survivor of her lineal descendants living at my death (during which period the income from said trust after her death shall be paid to or for the benefit of her lineal descendants per stirpes) at which time said trust shall terminate and the corpus thereof shall vest in her lineal descendants then living per stirpes.

Item II. In Item Two, Section Two, of my will I created a trust for the benefit of my son, Ellsworth P. Scales, to pay over the income to him during his life, and on his death the income to be paid over to his children or descendants of children per stirpes. It is my purpose, and I now direct, that said trust for my son Ellsworth shall continue until twenty-one years after the death of the latest survivor of his lineal descendants living at my death (during which [fol. 50] period the income from said trust after his death shall be paid over to or for the benefit of his lineal descendants per stirpes) at which time said trust shall terminate and the corpus thereof shall vest in his lineal descendants then living per stirpes.

Item III. I hereby cancel and revoke Section Three of Item Two of my said will dated January 1, 1926, and substituted in lieu thereof the following: After the trust property of the value of Two Hundred Thousand ($200,000) Dollars in the aggregate shall be set aside as provided in Section One and Two of Item Two of my original will, the residue of said trust property in the hands of the said Trustee under Paragraph Three of said trust agreement at the time of my death shall be disposed of as follows:

(a) There shall be set aside out of said residue the sum or value of Thirteen Thousand ($13,000.00) Dollars to be held and disposed of as set out in Item IV below; and

(b) The sum of Sixteen Thousand shall next out of said residue be paid over to my daughter, Anne, in order to equalize her with a like amount theretofore in my lifetime advanced by me to my son, Ellsworth; and

[fol. 51] (c) What then remains of said residue shall be divided into two equal parts, of which one-half shall be paid over to my daughter, Anne, and the other one-half to my son, Ellsworth, the payments to my daughter and son in (b) and (c) hereof to be theirs absolutely.

Item IV. I give to the Title Guarantee Loan & Trust Company, of Birmingham, Alabama, the said sum or value of Thirteen Thousand ($13,000.00) Dollars referred to in the preceding item in trust for the maintenance and education of my grand-daughter, Margaret Walton Scales. The Trustee shall invest said fund to produce an income and may change the investments at any time in its direction. The Trustee is particularly charged with seeing that my said grand-daughter shall have a proper education, and for this purpose and also for her maintenance the Trustee shall be at full liberty in its discretion to expend said sum, principal as well as interest, but its expenditure shall be only to pay such debts and accounts as the Trustee has itself expressly authorized. Said trust shall end when my said grand-daughter becomes twenty-one years of age, at which time any residue of said fund shall, if she is living, be turned over to her to be hers absolutely. If she should die before she reaches twenty-one the trust shall then terminate and any resid*ent* of said trust fund shall thereupon go to my son, Ellsworth P. Scales, if he is then living, to be his abso-[fol. 52] lutely, and, if he should be dead, shall be disposed of as provided with respect to my residuary estate.

Item V. I herewith add after the second paragraph of Item Three of my original will the following provisions: If Reynolds C. Winston (c) be living and be in my employ at the time of my death, then and in that event I give to him the sum of One Thousand ($1000.00) Dollars.

In all other respects I ratify and reaffirm my said will of January 1, 1926.

In Witness Whereof I have executed this as a First Codicil to my last will and testament, consisting of three typewritten

pages, in the left-hand margin of each of which I have signed my name and the date hereof, viz, May 21, 1931.

(Signed) Mrs. Grace C. Scales.

Signed by the said Grace C. Scales as and for a *do*cicil to her last will and testament, in the presence of us, the undersigned, who at her request and in her sight and presence, and in the presence of one another, have signed our names hereto as attesting witnesses, this 21st day of May, 1931.

(Signed) W. V. Flowers. Kate Killebrew.

[fol. 53] I, Grace C. Scales, of Nashville, Tennessee, having heretofore executed my last will and testament which bears date of January 1, 1926, and a codicil thereto which bears date of May 21, 1931, do make and declare this to be a second and further codicil thereto, to wit:

In my said will I appointed as Executor thereof, as to all property which I might own within the State of Tennessee, the Nashville Trust Company, a corporation existing at the date of my said will, which corporation is hereinafter referred to as the old Nashville Trust Company.

On May 22, 1933, subsequent to the execution of my said will, and said codicil thereto, a new corporation was chartered by the State of Tennessee bearing the name Nashville Trust Company, which corporation is hereinafter referred to as the New Nashville Trust Company.

I revoke the appointment of said old Nashville Trust Company as Executor of my said will as to all property which I may own at the time of my death within the State of Tennessee, and appoint in its place and stead as such Executor said new Nashville Trust Company.

I further driect that wherever the name of said old Nashville Trust Company appears in my said will, or in said [fol. 54] codicil thereto dated May 21, 1931, said new Nashville Trust Company shall be substituted therefor; and I hereby vest in said new Nashville Trust Company all the rights and powers given under my said will to said old Nashville Trust Company.

I direct this codicil to be attached to and become a part of my said will to all intents and purposes.

In Witness Whereof, I have signed my name hereto this the 18th day of April, 1934.

(Signed) Grace C. Scales.

Signed by the said Grace C. Scales as and for a second codicil to her last will and testament, in the presence of us, the undersigned, who, at her request, and in her sight and presence, and in the presence of each other, have subscribed our names hereto as attesting witnesses, this the 18th day of April, 1934.

(Signed) Kate Killebrew, Witness. (Signed) John W. Barton, Witness.

[fol. 55] IN CHANCERY COURT OF DAVIDSON COUNTY

SUBPOENA—Issued February 9, 1938

State of Tennessee to the Sheriff of Davidson County, Greeting:

We command you to summon Walter Stokes, Jr., Commissioner of Finance and Taxation of the State of Tennessee—if to be found in your County, to appear before the Chancellor of Part One of our Chancery Court at Nashville, on the first Monday in March 1938, it being the seventh day of March 1938, there and then to answer the Original Bill of Complaint of Nashville Trust Company, et al., Extrs. of estate of Mrs. Grace C. Scales, deceased, vs. Walter Stokes, Jr., Commissioner of Finance and Taxation, et al., and further do and receive what our said Court shall consider in that behalf; and this you shall in nowise omit, under the penalty prescribed by law. Herein fail not, and have you then and there this writ.

Witness, Joseph R. West, Clerk and Master of our said Chancery Court, at office, in the Court House at the City of Nashville, Tennessee, this first Monday in October 1937, and the 162nd year of American Independence.

Joseph R. West, Clerk and Master, by C. H. Swann, D. C. & M.

[fol. 56] SHERIFF'S RETURN

Came to hand same day issued and executed by reading the within process to Chas. C. Gilbert, Jr., Asst. Taxation Commissioner. Chas. C. Gilbert, Jr. also accepted service

for Walter Stokes, Jr., Commissioner of Finance & Taxation. Delivered copy of bill to Chas. C. Gilbert, Jr.
This February 14, 1938.
Leon Taylor, Coroner, by Maurice Wise, C. D.

"Service of the within process is hereby accepted this 14th day of February 1938.
Walter Stokes, Jr., by Chas. C. Gilbert, Jr.

[fol. 57] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ANSWER AND CROSS-BILL—Filed March 17, 1938, as Answer; Filed as a Cross-Bill April 26, 1938

Now come the defendants, Henry S. Long, Chairman, and John P. Kohn, Sr., and W. W. Ramsey, associates, members of and comprising the State Tax Commission of the State of Alabama, and make answer to the bill of complaint heretofore filed against them and Walter Stokes, Jr., as Commissioner of Finance and Taxation of the State of Tennessee as follows:

[fol. 58] I

These defendants admit the allegations of fact contained in paragraph 1 of the bill of complaint. Further answering said paragraph of said bill, these respondents aver and show to the Court that by Article XII, Chapter 2, of the General Revenue Act of the State of Alabama, approved July 10, 1935 (Acts 1935, pp. 434-441), there was levied and imposed upon all net estates passing by will, devise or under the intestate laws of the State of Alabama or otherwise, which are lawfully subject to the imposition of an estate tax by the State of Alabama, a tax equal to the full amount of the tax permissible when levied by and paid to the State of Alabama as a credit or deduction in computing any Federal estate tax payable by such estate according to the Act of Congress in effect on the day of the death of the decedent, taxing such estate, with respect to the items subject to taxation in Alabama; that by Section 347.17 of said act of the Legislature of Alabama it was provided that:

"The administration of this chapter is vested in and shall be exercised by the State Tax Commission which shall

prescribe the forms and reasonable rules of procedure in conformity with this chapter for making returns and for [fol. 59] ascertainment, assessment and collection of the taxes imposed hereunder."

II

These defendants admit the allegations of fact contained in the second paragraph of said bill of complaint and the correctness of the exhibit of said paragraph of said bill.

III

These defendants admit the allegations of fact contained in the third paragraph of said bill of complaint and the correctness of the exhibit to said paragraph of said bill.

IV

These defendants admit the allegations of fact contained in the fourth paragraph of said bill of complaint and the correctness of the exhibit to said paragraph of said bill.

V

These defendants admit the allegations of fact contained [fol. 60] in the fifth paragraph of said bill of complaint.

VI

Answering paragraph VI of said bill of complaint, these defendants admit that they, acting in their official capacity as the State Tax Commission of the State of Alabama, have heretofore and on, to wit, the 11th day of October 1937, levied and assessed an estate tax under said act of the Legislature of Alabama approved July 7, 1931, upon that portion of the estate of Mrs. Grace C. Scales which was in the State of Alabama, under the circumstances hereinafter set forth in detail, at the time of her death, said property and the value thereof at the date of the death of Mrs. Scales, as estimated by Nashville Trust Company, executor, by return filed with the Internal Revenue Service of the Treasury Department of the United States, being as follows:

$240,000 Pratt Consolidated Coal Company 5% Bonds @ 85	$204,000.00
$1,000 6% First Mortgage Note signed Grazia Graffeo	1,000.00

$2,500.00 First Mortgage Note signed B. P. Beard	2,500.00
63⅓ shares Empire Mining Company common stock, par value $100 @ $215	13,616.67
9 shares Ellsworth Ore Company common stock, par value $100, @ $700	6,300.00
[fol. 61] 34 shares Fulton Mining Company common stock, par value $100 @ 60	2,040.00

A copy of said assessment as so fixed by the State Tax Commission of Alabama and as served upon Nashville Trust Company, as executor of the estate of Mrs. Grace C. Scales, is hereto attached as Exhibit A and made a part hereof.

Furthering answering said paragraph of said bill of complaint, these defendants respectfully show to the Court, that, as shown by Exhibit 1 to the bill of complaint herein, the said bonds of the Pratt Consolidated Coal Company and the shares of stock in the Empire Mining Company, the Ellsworth Ore Company and Fulton Minding Company consituted a part of the corpus of the trust established by the said Grace C. Scales by paragraph 3 of said trust instrument dated December 29, 1917, and the remaining items of the assets hereinabove set forth as being in the State of Alabama at the time of the death of the said Grace C. Scales represented reinvestments made by the Title Guarantee Loan & Trust Company of Birmingham, Alabama, as trustee under said trust instrument, in strict accordance with the terms thereof and as representing substitution of other assets originally delivered to said trustee in accordance with said trust instrument of December 29, 1917.

[fol. 62] These defendants further show to the Court that the Pratt Consolidated Coal Company was a corporation under the laws of the State of Alabama, and in the year 1905 issued a series of 5% first mortgage bonds, due in the year 1955, secured by a mortgage to the Title Guarantee Loan & Trust Company of Birmingham, Alabama, as Trustee, on about 70,000 acres of coal lands in the State of Alabama. That said Empire Mining Company, Ellsworth Ore Company and Fulton Mining Company were and are corporations engaged in mining in the State of Alabama and not elsewhere.

Further answering said paragraph of said bill of complaint, these defendants show to the Court that said Pratt Consolidated Coal Company bonds and the common stock in said Empire Mining Company, Ellsworth Ore Company

and Fulton Mining Company were bequeathed to the said Grace C. Scales as one of the residuary legatees under the last will and testament of her brother, T. T. Hillman, who formerly lived in Jefferson County, Alabama, and was one of the organizers or large stockholders in said four corporations.

That said Pratt Consolidated Coal Company bonds and the certificates of stock in said three corporations named above, originally the property of the said T. T. Hillman, upon the death of the said T. T. Hillman in the year 1905 were bequeathed by him to the Title Guarantee Loan & Trust Com-
[fol. 63] pany, of Birmingham, Alabama, to be held in trust for his wife, Mrs. T. T. Hillman, during her lifetime, with instructions to deliver said securities upon her death to his sister, the said Mrs. Grace C. Scales.

These defendants are advised and, therefore, aver that the said Mrs. T. T. Hillman died during the year 1917, and immediately thereafter and as soon as title thereto had vested in her by reason of the death of the said Mrs. T. T. Hillman, the said Mrs. Grace C. Scales, without ever obtaining physical possession of said securities, and without ever removi g them from the custody of the said Title Guarantee Loan & Trust Company or from the State of Alabama, conveyed the said bonds and shares of stock in trust to the Title Guarantee Loan & Trust Company by the instrument of December 29, 1917, which is made Exhibit A to complainant's bill; and these defendants further aver that said securities have never been physically within the State of Tennessee.

These defendants aver that said bonds and shares of stock have at all time since the death of the said T. T. Hillman in 1905 been physically within the State of Alabama and in the custody of the said Title Guarantee Loan & Trust Company of Birmingham, as Executor and as Trustee under the will of the said T. T. Hillman; later as Trustee under the trust instrument of December 29, 1917; and later as [fol. 64] Executor and as Trustee under the will of Mrs. Grace C. Scales, deceased.

These defendants further aver that at all times since the death of the said T. T. Hillman in the year 1905, and particularly since the execution of the trust instrument of December 29, 1917, said bonds and shares of stock described above have been physically held, preserved and protected by the said Title Guarantee Loan & Trust Company within the State of Alabama, and have there been employed and used

by the said Trust Company for the purpose of producing income.

Respondents are advised and believe and upon such advice and belief respectfully show unto the Court that said assets of said trust hereinabove specifically described in this paragraph had acquired a business situs or "a situs analogous to that of tangible personal property" within the State of Alabama so that the same were subject to a death duty to but one state upon the death of the said Grace C. Scales, whether the same be what is generally denominated a succession tax, an estate tax, or an inheritance tax, and that said property is subject to the estate tax imposed by the laws of the State of Alabama and to the succession, inheritance or estate tax of no other state.

Respondents further show unto the Court that to construe [fol. 65] the inheritance tax law of the State of Tennessee, imposing a charge upon transfers of all intangible property of a decedent, as applying to the bonds, stocks and other assets hereinabove described which had acquired a business situs in the State of Alabama, as hereinabove set forth, would be to take the property of the estate of said Grace C. Scales now in the possession of complainant, Title Guarantee Loan & Trust Company, as executor and as trustee under her will, without due process of law, in violation of Section 1 of the 14th Amendment of the Constitution of the United States.

These respondents are not informed as to whether the defendant, Walter Stokes, Jr., acting in his official capacity as Commissioner of Finance and Taxation of the State of Tennessee, has claimed for the State of Tennessee a state inheritance tax or death transfer tax upon the whole of Mrs. Scales' estate, including that portion assessed by the State of Alabama, but if such averment in said paragraph of said bill be correct, then these respondents aver that the State of Tennessee is not entitled to any estate or inheritance tax calculated or based upon the value of the said assets in the State of Alabama held by said Birmingham Title Guarantee Loan & Trust Company as executor or as trustee, as hereinabove specifically set forth and described, for the reason that to permit the State of Tennessee to [fol. 66] levy and collect a state inheritance tax upon said property would be to subject same to double taxation, in violation of Section 1 of the 14th Amendment to the Constitu-

tion of the United States, providing that no state shall deprive any person of property without due process of law.

VII

These respondents admit that the complainants should not be compelled to pay inheritance taxes or death transfer taxes upon the same portions of Mrs. Scales' estate to both Tennessee and Alabama and that such taxation would be in violation of the 14th Amendment to the Constitution of the United States and, as herein specifically set forth, these respondents aver that only the State of Alabama is authorized to levy and collect an estate tax upon the portion of said estate located within the territorial jurisdiction of the State of Alabama as hereinabove specifically set forth.

These complainants admit that they appear voluntarily in this cause to invoke the jurisdiction of this Honorable Court for the purpose of having the rights of the State of Alabama adjudicated in this proceeding, and aver that such voluntary appearance has been made with the consent and approval of the Governor and of the Attorney-General of Alabama, as required by the statutes of said state in such [fol. 67] cases made and provided.

VIII

For further answer to said bill of complaint and by way of cross-bill, these defendants respectfully pray this Honorable Court to take jurisdiction of the subject matter of this litigation and upon a hearing to make and enter a decree in favor of the State of Alabama and against Title Guarantee Loan & Trust Company, as executor of the estate of Mrs. Grace C. Scales, deceased, in the State of Alabama, for the sum of, to wit, $2202.42, with interest from the 4th day of February, 1938, to date of payment at the rate of six (6%) per cent per annum.

And if mistaken in the relief herein specifically prayed, these respondents and cross-complainants pray for such other, further and general relief as to which they may be entitled in the premises.

Respectfully submitted, The State Tax Commission of Alabama, Henry S. Long, Chairman. John P. Kohn, Associate. W. W. Ramsey, Associate, Members of and Comprising the State Tax Commission [fol. 68] of the State of Alabama. H. F. Crenshaw, Solicitor for Respondents and cross-Complainants.

I will be security for costs: A. B. Benedict.

[fol. 69] EXHIBIT "A"

STATE OF ALABAMA,

The State Tax Commission,

Montgomery

October 11, 1937.

Nashville Trust Company, Executor, Estate of Mrs. Grace C. Scales, Nashville, Tennessee.

DEAR SIRS:

Attention Mr. A. D. Reed, Assistant Trust Officer

Receipt is acknowledged of your letter of July 28th, together with estate tax return, cpoies of two trust agreements and copy of will in connection with estate of Mrs. Grace C. Scales, who died November 4, 1936, a resident of Nashville, Tennessee.

According to the trust agreement and will of Mrs. Scales, certain property as returned under schedule "B" is covered by the trust agreement and disposed of by her will, the said property having been in Alabama for a great many years.

[fol. 70] We find by the returned filed, gross value of the estate, $266,058.52.

Returned value of trust property in Alabama, $229,456.67.

Equal 86.2429%.

The return as filed shows a net estate under Federal Acts of 1926 of $156,406.26.

Producing estate tax under Federal Acts of 1926, $3,192.18.

Reduced to 80%, $2,553.75.

Alabama proportion 86.2429%.

Alabama estate tax $2.202.42.

which is due and payable on or before the expiration of fifteen months from date of death of decedent, namely February 4, 1938, interest will accrue from February 4, 1938 to date of payment, at rate of 6%.

Yours very truly, State Tax Commission, by H. T. Knight, Chief Clerk, Estate Tax Department.

K/a.

Copy.

[fol. 71] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ANSWER OF DEFENDANT, WALTER STOKES, JR.—Filed April 20, 1938

The defendant Walter Stokes, Jr., Commissioner of Finance and Taxation of the State of Tennessee, for separate answer to the bill filed against him and others in the above styled cause, says:

I

This defendant admits the averments of fact in paragraph I of the bill and admits that the complainants are entitled to a declaration under Sections 8835 to 8847 inclusive, of the Code of Tennessee.

II, III, IV, and V

This defendant admits the averments of fact contained in [fol. 72] paragraphs II, III, IV, and V of complainants' bill and the correctness of the exhibits to the said paragraphs of said bill.

VI

The defendant admits that acting in his official capacity as Commissioner of Finance and Taxation of the State of Tennessee he has claimed for the State of Tennessee a State inheritance tax upon the whole of Mrs. Scales' estate, including that portion assessed by the State of Alabama. Such claim has been made under Section 1259 of the Code of Tennessee, which purports to impose an inheritance tax when the transfer is from a resident of this State upon "all intangible personal property."

Defendant admits upon information and belief that the taxing officers of the State of Alabama are also demanding an estate tax or transfer tax upon those intangibles which constituted a portion of Mrs. Scales' estate found at the time of her death in the State of Alabama, but the defendant is advised and, therefore avers that the State of Alabama has no lawful right under the Constitution of the United States to collect such tax.

[fol. 73] VII

This defendant admits upon information and belief the averments of fact contained in paragraph VII of complainants' bill. The defendant admits that the complainants ought not to be required to pay inheritance taxes or estate taxes upon the same portion of Mrs. Scales' estate to both Tennessee and Alabama and that such taxation by both states would be in violation of the Fourteenth Amendment to the Constitution of the United States. The defendant avers that the situs of intangible property for the purpose of succession or inheritance taxes, generally speaking, is the domicile of the decedent at the time of death. There is a possible exception to this general rule with respect to the situs of intangibles for the purpose of inheritance taxes where such intangibles have been so used in a state other than that of the decedent's domicile as to give them a situs analogous to the actual situs of tangible personal property. Defendant avers that the mere fact that a resident of Tennessee has established a trust estate consisting of intangible property with the settlor having the present right to the enjoyment of the income from the trust fund and the power to remove the trust securities at any time into another State does not give such securities a business situs within the State of the residence of the trustee.

Further answering, the defendant avers that the intang-
[fol. 74] ible property in Alabama belonging to Mrs. Scales, a deceased resident of Tennessee, which property is more particularly described in the bill of complaint, ought to be declared subject to the inheritance tax of Tennessee and not liable for an inheritance tax or succession tax by the State of Alabama.

And now having fully answered, this defendant prays a declaration and decree of the Court holding subject to the inheritance or succession tax of Tennessee the intangible property held by a trustee in Alabama for the benefit of Mrs. Scales, the settlor, a resident of Tennessee, during her lifetime, subject to the provision that Mrs. Scales might at any time remove such securities from Alabama by the selection of a trustee residing elsewhere, and to be disposed of at her death as she should direct by will.

Walter Stokes, Jr., Commissioner of Finance and Taxation. Roy H. Beeler, Attorney-General. Edwin F. Hunt, Assistant Attorney-General. Dudley Porter, Jr., Field Attorney.

[fol. 75] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

AMENDMENT TO ANSWER OF HENRY S. LONG, ETC, ET AL.—
Filed April 26, 1938

Now come the defendants, Henry S. Long, Chairman, and John P. Kohn, Sr., and W. W. Ramsey, Associates, Members comprising the State Tax Commission of the State of Alabama, and by leave of the Court first had and obtained, amend their answer heretofore filed in said cause in the manner following:

Amend Paragraph VI of said answer by adding thereto the following:

That as fully appears from the trust indenture between Mrs. Grace C. Scales and the Title Guarantee Loan & Trust Company, dated January 11th, 1929, attached as Exhibit A to the bill, as modified by Exhibit B to said bill, the title, possession and control of the securities, the subject matter of the trust, passed completely to complainant, Title Guarantee Loan and Trust Company, and that such was the [fol. 76] status of the Securities at the time of the death of the said Mrs. Grace C. Scales. And these respondents aver and show to the Court that the said Grace C. Scales did not during her life, nor had Ellsworth P. Scales, Anne S. Benedict, or either of them, prior to her death, exercised the right to "remove the Title Guarantee Loan & Trust Company, as trustee and appoint a substituted trustee," and the respondents aver and show to the Court that even had said original trustee although he or it might have been a non-resident of Alabama would not have had any right to remove the assets of said trust estate to another state except by getting an order from the Circuit Court in Alabama, in compliance with the statutes of Alabama, which said statutes are in words and figures as follows, the same being a correct copy of Article 4, of Chapter 352, of the current Code of Alabama:

"Article 4

"Removal of Trust Estate to Another State

"10418. (6081) (4179) (3560) (3744) Removal of trust estate.—The circuit court of the county in which a trust resides or in which a trust estate is created, or is being

administered, may authorize the removal of such estate to another state.

[fol. 77] "10419. (6082) (4180) (3561) (3745) Mode of obtaining authority for removal.—A cestue que trust or a trustee may obtain authority for the removal of a trust, by petition verified by affidavit, which must state the property to be removed, the place to which removal is desired, the names and residences of the parties having interest therein, which of them, if any, are minors, or of unsound mind, and the facts which show that the removal will be of benefit to the cestue que trust.

"10420. (6083) (4181) (3562) (3745) Hearing: notice.—On the filing of the petition, the register must appoint a day for the hearing thereof, of which notice for at least ten days must be given the parties residing within this state, by the service of summons. If any of such parties be minors or of unsound mind, summons must be served on their guardian, if any they have, or if they have no guardian, upon such person as may have charge of them, or with whom they reside. If any such parties reside without the state, notice must be given them by publication, in the mode, and for the length of time prescribed by the circuit judge. After notice given, the register or judge must appoint a suitable person as guardian ad litem to represent and defend for the minor or parties of unsound mind.

[fol. 78] "10421. (6084) (4182) (3563) (3746) Decree on hearing.—If, on the hearing, the Court is satisfied from the evidence adduced, which may be oral or by deposition, that a removal would be to the interest of the cestue que trust, a decree must be rendered authorizing it. Before the execution of the decree, the party or parties, at whose instance the removal is to be made, must, in the state to which the property is to be removed, before a court having jurisdiction, give bond with sufficient surety, to be approved by such court, in penalty and with condition that will fully protect all parties in interest from loss or injury by reason of the removal, or because of the waste or negligence of the party or parties to whose care and custody such property is instructed; which bond must be properly certified, and filed in the circuit court, and must, before removal, be approved by the circuit judge."

A. H. Carmichael, Attorney-General of Alabama.
Ray Rushton, Attorney for Defendants Henry S. Long, et al.

[fol. 79] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

STIPULATION AS TO FACTS—Filed April 26, 1938

In the above stated cause it is agreed:

That the facts stated in the original bill and the facts stated in the answers of all the respondents, as last amended, are true as stated.

O. K. for entry:

Chas. C. Trabue, Jr., Trabue, Hume & Armistead, Solicitors for Complainants. Edwin F. Hunt, Dudley Porter, Jr., for Defendant Stokes, Commissioner. A. H. Carmichael, Ray Rushton, Attorneys for Defendants, Henry S. Long et al., Comprising Alabama State Tax Commission.

[fol. 80] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ORDER GRANTING LEAVE TO FILE AMENDED AND SUPPLEMENTAL ANSWER—April 27, 1938

In this cause on April 26, 1938, come defendants Henry L. Long, John P. Kohn, Sr., and W. W. Ramsey, and move the Court for leave to file an amended and supplemental answer; and it appearing that said application is unresisted and is agreed to be all of the parties, it is accordingly ordered, adjudged and decreed that said amended and supplemental answer be filed.

O. K. for entry:

Chas. C. Trabue, Jr., Trabue, Hume, & Armistead, Solicitors for Complainants.

[fol. 81] IN CHANCERY COURT OF DAVIDSON COUNTY, PART ONE

53144

NASHVILLE TRUST COMPANY et al., Executors, etc.,

vs.

WALTER STOKES, JR., Commissioner, etc., et al.

DECREE—April 27, 1938

This cause came on to be regularly heard this April 26, 1938, before the Honorable R. B. C. Howell, Chancellor,

holding Part One of the Chancery Court of Davidson County, upon the original bill, the answer of defendant Walter Stokes, Jr., the answer and cross-bill and amended answer of defendants Henry S. Long and others, together with a stipulation signed by all of the parties that the facts set up and alleged in the original bill and in the answers of all the respondents are true.

And it appearing from the facts admitted that Mrs. Grace C. Scales was a resident of the State of Tennessee and domiciled therein for many years and until the time of her death in 1936. That on the 27th day of December 1917, the said Mrs. Scales, while a resident of Tennessee, executed jointly [fol. 82] with complainant, Title Guarantee Loan & Trust Company, a corporation under the laws of Alabama and having its office and place of business in Birmingham, in said State, a certain indenture or trust agreement by the terms of which she did "grant, sell, transfer and deliver" to the said corporation as Trustee a large amount of stocks and bonds of which said complainant, Title Guarantee Loan & Trust Company, had had possession as Trustee under the provisions of the will of a brother of Mrs. Scales, by the terms of which the said securities became the property of Mrs. Scales on the death of the widow of her brother. That said securities were never taken from the physical possession of said Trust Company at Birmingham, but after the execution of the indenture remained in the possession of the said Trust Company.

That by the terms of said trust indenture as amended by agreement between all the parties interested on January 11th, 1929, Mrs. Scales reserved to herself (1) the net income for life, (2) the right to direct the sale of any or all of the property of the trust and reinvestment of same, but providing that "all property acquired by any reinvestments to be held under the terms and conditions of the trust created by this paragraph," (3) the right to remove the Trustee and substitute another, which was never exercised, and [fol. 83] (4) the right to dispose of all the trust property "by her last will and testament," with a provision "and if she makes disposition by last will and testament, then the trust property is to be hand-led and disposed of as directed in said will," and providing further that in the event she "makes no disposition of the trust property by her last will and testament" the property was still to be held in trust for the benefit of her husband and children.

That Mrs. Scales, in the exercise of her reserved right to dispose of all trust property in the custody of the complainant Title Guarantee Loan & Trust Company, as Trustee, did, by her last will and testament dated January 1, 1926, make disposition of said securities in the hands of said Title Guarantee Loan & Trust Company, as Trustee, by the terms of which she directed that said securities remain in the hands of said Trustee for the benefit of certain persons set forth with considerable elaboration in her said will.

That by the terms of her last will and testament Mrs. Scales appointed the Nashville Trust Company, a corporation of Nashville, Tennessee, as executor of her will as to all property that she owned in the State of Tennessee at the time of her death, and appointed the Title Guarantee Loan [fol. 84] & Trust Company as executor of her last will as to all property "which I may own in the State of Alabama and also as to all property which I may have the right to dispose of by last will and testament in said State."

The complainant, Nashville Trust Company, after the probate, of said will in Davidson County, Tennessee, qualified as Executor of said will, and after said will was probated in Jefferson County, Alabama, complainant Title Guarantee Loan & Trust Company qualified as Executor of said estate; and Letters testamentary were issued to the said Nashville Trust Company by the proper court of Davidson County, Tennessee, and letters testamentary were issued to the said Title Guarantee Loan & Trust Company by the proper court of Jefferson County, Alabama, the county in which Birmingham is located.

That the original bill in this cause was filed by both of the said Executors under Sections 8835-8847, inclusive, of the Tennessee Code of 1932, known as the Tennessee Declaratory Judgments Act, for the purpose of obtaining an adjudication as to whether the State of Alabama or the State of Tennessee is entitled to collect death transfer taxes on that portion of the estate of Mrs. Scales which was in the possession of complainant Title Guarantee Loan & Trust Company, as Trustee, at Birmingham, Alabama, at the time [fol. 85] of her death.

And it appearing to the Court that under the facts set up by the pleadings and admitted by the stipulation filed that said securities in the hands of the Title Guarantee Loan & Trust Company, as Trustee, at the time of the death of

Mrs. Grace C. Scales had a legal situs analogous to the situs of tangible personal property in the State of Alabama:

It is accordingly ordered, adjudged and decreed by the Court that the State of Alabama may legally impose a death transfer or succession tax on said securities held at the time of Mrs. Scales' death in trust by the Title Guarantee Loan & Trust Company, as Trustee, and that only one state may impose death transfer taxes on this portion of said estate.

It is further ordered, adjudged and decreed that the inheritance tax law of Tennessee, in so far as it attempts to impose a tax upon transfers by a resident of Tennessee of "all intangible personal property" (Code Section 1259) is unconstitutional and void under the facts of this case as a violation of the due process of law clause of the Fourteenth Amendment to the Federal Constitution.

[fol. 86] To the foregoing decree the defendant, Walter Stokes, Jr., Commissioner of Finance and Taxation of the State of Tennessee, excepts and prays an appeal to the present term of the Supreme Court at Nashville, which appeal is granted without the execution of a cost bond, as is provided by law in such cases, the said defendant being sued in his official capacity as Commissioner of Finance & Taxation.

The complainants, who sue under the Declaratory Judgments Act, will pay the costs.

O. K. for entry:

Chas. C. Trabue, Jr., Trabue, Hume & Armistead, Solicitors for Complainants.

[fol. 87] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 88] IN SUPREME COURT OF TENNESSEE, DECEMBER TERM, 1937

Davidson Equity. No. —

NASHVILLE TRUST COMPANY et al.

vs.

WALTER STOKES, JR., Commissioner, et al.

Statement of the Case, Assignments of Error, Brief and Argument for Walter Stokes, Jr., Appellant—Filed May 5, 1938

May it please the court:

STATEMENT OF THE CASE

The Bill

The Nashville Trust Company and the Title Guarantee Loan and Trust Company, executors, filed the original bill under the Declaratory Judgments Act to obtain a declaration as to the taxable situs of certain intangible personal property of which the decedent, Mrs. Grace C. Scales, was the owner at the time of her death. The adjudication [fol. 89] sought was whether the State of Alabama or the State of Tennessee is entitled to levy and collect inheritance taxes or death transfer taxes on the property in question (Tr. p. 6).

The bill avers that in 1917 Mrs. Grace C. Scales, a resident of Tennessee, conveyed certain stocks and bonds to the Title Guarantee Loan & Trust Company of Birmingham, Alabama, as Trustee. By paragraph three of the trust instrument Mrs. Scales directed the trustee to hold certain stocks and bonds in trust, the income to be paid to the settlor during her lifetime. Mrs. Scales reserved to herself the right to direct any encroachment upon the corpus of the trust. She also reserved the right to dispose of the property by will, the trust instrument providing for the disposition to be made of the property in the event Mrs. Scales died intestate. A copy of the trust instrument was made an exhibit to the bill (Tr. pp. 8-20).

The trust instrument also reserved to the settlor, Mrs. Scales, the right to direct the trustee to sell any or all of the trust property, to reinvest the proceeds as directed by the

said Mrs. Scales, selling and reinvesting as often as she deemed fit, the property acquired by any reinvestment to be held under the terms of the trust (Tr. p. 17).

By a subsequent instrument in 1929, Mrs. Scales released [fol. 90] and extinguished her right to encroach upon the corpus of the trust with reference to certain bonds of the Pratt Consolidated Coal Company, which bonds constitute approximately 90% of the trust property in question. Her right to encroach upon the trust property other than such bonds was not impaired or changed (Tr. p. 3).

The trust instrument, in addition to providing that the settlor should receive the life income, reserved to the settlor the right at any time to remove the trustee and to appoint a substitute trustee as often as she saw fit. After such removal, to be accomplished in writing, it was made the duty of the Title Guarantee Loan and Trust Company or any other trustee at once to surrender to the substitute trustee all property held under the trust agreement. (Tr. p. 18.) It was provided that any substitute trustee should hold the property received under the terms and provisions of the trust.

Mrs. Scales died a resident of Tennessee, leaving a will which undertook to dispose of all property held under the trust instrument of 1917, as amended, and which was admitted to probate in the County Court of Davidson County, Tennessee, in 1936. In the exercise of her power of disposition by will Mrs. Scales set up three testamentary trusts, the beneficiaries of such trusts being residents of Tennessee. [fol. 91] A small portion of the property held under the trust of 1917 was by Mrs. Scales' will bequeathed to designated persons, residents of Tennessee, without any testamentary trusts. (Tr. p. 5.) In her will Mrs. Scales appointed the Nashville Trust Company as executor as to such of her property as might be found in Tennessee and she appointed the Title Guarantee Loan & Trust Company executor of such of her property as might be found in Alabama (Tr. p. 4).

The bill avers that the taxing officers of Alabama and of Tennessee are both demanding an inheritance tax upon that portion of Mrs. Scales' estate which during her lifetime was held in trust in Alabama and avers that under the Fourteenth Amendment to the Constitution of the United States one of the states, but not both of them, is entitled to impose an inheritance or succession tax. The bill avers that the

State Tax Commission of Alabama has agreed voluntarily to appear and invoke the jurisdiction of the courts in order to have the rights of the parties adjudicated. The bill seeks a declaration as to what part of the estate is taxable by Tennessee and what part is taxable by Alabama (Tr. p. 6).

The Answer of the Alabama Tax Commission

The Alabama Tax Commission filed an answer substantially admitting the facts averred in the original bill and [fol. 92] alleging certain additional facts. The answer avers that the statutes of Alabama impose "upon all net estates passing by will, devise or under the intestate laws of the State of Alabama or otherwise, which are lawfully subject to the imposition of an estate tax by the State of Alabama" a specified tax (Tr. p. 39).

The answer admits that acting pursuant to the said statutes the taxing officers of the State of Alabama have levied and assessed an estate tax upon that portion of the estate of Mrs. Grace C. Scales which was in the state of Alabama under the circumstances set forth.

The answer avers that the stocks and bonds which constituted the corpus of the estate of Mrs. Scales in 1917 were stocks and bonds issued by corporations engaged in business in Alabama and not elsewhere. (Tr. p. 42.) The answer avers that Mrs. Scales had acquired such stocks and bonds by reason of the death of her brother and that she established the trust in 1917 without ever having obtained the physical possession of said securities which had theretofore been in the actual custody of the Title Guarantee Loan & Trust Company. The answer avers that said stocks and bonds have at all times since the death of Mrs. Scales' brother in 1905 been physically in the State of Alabama in the custody of said Title Guarantee Loan & Trust Company.

[fol. 93] The answer avers that the stocks and bonds constituting the corpus of the trust created by Mrs. Scales in 1917 have acquired "a business situs or a situs analogous to that of tangible personal property within the State of Alabama", so as to be subject to the estate tax imposed by Alabama and to the succession or inheritance tax of no other state (Tr. p. 44).

The answer avers that to construe the inheritance tax law of Tennessee as imposing a tax upon the stocks and bonds "which acquired a business situs in the State of Alabama, as hereinabove set forth" would be to violate the due process

of law clause of the Fourteenth Amendment (Tr. p. 44). The answer admits that the State Tax Commission of Alabama appears voluntarily to invoke the jurisdiction of the Court for the purpose of having the rights of the State of Alabama adjudicated and avers that such voluntary appearance is made with the consent and approval of the Governor and of the Attorney-General of Alabama as required by the statutes of said State (Tr. p. 46).

The answer by way of cross-bill seeks a decree in favor of the State of Alabama for the amount of tax alleged to be due that state.

[fol. 94] Answer of Commissioner of Finance and Taxation of the State of Tennessee

The answer of the Commissioner of Finance and Taxation of the State of Tennessee admitted the averments of fact in the original bill and asked a declaration of the court that under such facts the intangible personal property of the decedent, Mrs. Scales, a resident of Tennessee, be declared subject to the inheritance tax of Tennessee. The answer admitted that such intangible property was not subject to a succession or transfer tax in more than one state (Tr. p. 49).

Amended Answer for Alabama

At the hearing, the answer of the State Tax Commission of Alabama was amended so as to aver that under the trust instrument exhibited to the original bill the control of the securities which were the subject matter of the trust passed completely to the Title Guarantee Loan & Trust Company and that such was the status of the securities at the time of the death of Mrs. Scales. The amended answer averred that Mrs. Scales never exercised the right given her in the trust instrument to remove the Title Guarantee Loan & Trust Company as Trustee. The amended answer averred that if a substituted trustee in another state had been named [fol. 95] the trust assets could have been removed from Alabama only in compliance with certain statutes of Alabama which are copied in the amended answer (Tr. p. 52).

The Decree

The decree recited that the cause was heard upon a stipulation of all the parties "that the facts set up and alleged

'in the original bill and in the answers of all the respondents are true."

After reciting substantially the facts hereinbefore set forth the decree adjudged that the securities held by the Title Guarantee Loan & Trust Company as trustee at the time of the death of Mrs. Scales "had a legal situs analogous to the situs of tangible personal property in the State of Alabama." It was accordingly decreed and declared that the State of Alabama may legally impose a death transfer or succession tax on such securities. It was further decreed and declared that in so far as the inheritance tax law of Tennessee attempts to impose a tax upon the transfer of such securities it is "unconstitutional and void under the facts of this case as a violation of the due process of law clause of the Fourteenth Amendment to the Federal Constitution" (Tr. p. 57).

The decree granted to Walter Stokes, Jr., Commissioner [fol. 96] of Finance and Taxation of the State of Tennessee, an appeal without the execution of a cost bond, the said defendant being sued in his official capacity as Commissioner of Finance and Taxation (Tr. p. 60).

The appellant, Walter Stokes, Jr., Commissioner of Finance and Taxation of the State of Tennessee, now assigns errors.

Assignments of Error

First Assignment

The Chancellor erred in declaring and decreeing that the intangible personal property of Mrs. Scales in the hands of the Title Guarantee Loan & Trust Company as trustee had a legal situs analogous to the situs of tangible personal property in Alabama and was subject to a death transfer or succession tax in Alabama (Tr. p. 60).

He should have declared and decreed that for purposes of death transfer or succession taxes the situs of such intangible personal property was Tennessee, the residence of Mrs. Scales at the time of the creation of the trust and at the time of her death.

[fol. 97]

Second Assignment

The Chancellor erred in declaring and decreeing that the inheritance tax law of Tennessee, in so far as it attempts to impose a tax under the facts of this case, is unconstitu-

tional and void as a violation of the due process of law clause of the Fourteenth Amendment to the Federal Constitution (Tr. p. —).

He should have declared and decreed that the inheritance tax law of Tennessee, which provides for a tax upon transfers of all intangible personal property by will of a resident of Tennessee, is valid and constitutional.

* * * * * * *

Respectfully submitted, Edwin F. Hunt, Assistant Atty. General. Dudley Porter, Jr., Field Attorney.

[fol. 98] IN SUPREME COURT OF TENNESSEE

Davidson Equity

NASHVILLE TRUST COMPANY et al.

vs.

WALTER STOKES, Commissioner et al.

OPINION—Filed June 11, 1938

The question to be determined in this cause is the taxable situs of certain intangible personal property belonging to Mrs. Grace C. Scales, a resident of Tennessee, and placed by her in the hands of the Title Guarantee Loan & Trust Company, an Alabama corporation with its principal place of business at Birmingham in that State, under a trust agreement executed by her in December, 1917, and amended in 1929, naming her son and daughter as beneficiaries.

Mrs. Scales was domiciled in Tennessee for many years and until the time of her death in 1936. Both the State of Tennessee and the State of Alabama asserted the right to levy and collect inheritance or death transfer taxes on the intangibles in the hands of the trustee in Alabama. The bill herein was filed under the Declaratory Judgments Act, and the declaration sought is which of these states is entitled to levy and collect such taxes on the property in [fol. 99] question. It is agreed that both States may not tax the property.

It appears that the Title Guarantee Loan & Trust Company had possession of the securities here involved, as

trustee, under the provisions of the will of a brother of Mrs. Scales, by the terms of which the securities became the property of Mrs. Scales on the death of the widow of the brother. These securities were never taken from the physical possession of the trustee of Mrs. Scales, but remained in its possession under the terms of the trust agreement executed by Mrs. Scales in December, 1917. Under this agreement, Mrs. Scales did "grant, sell, transfer, assign and deliver" to the trustee the securities in question, with power to "hold, manage and look after" the same. Mrs. Scales reserved to herself (1) the net income for life; (2) the right to direct the sale of any or all the securities in the trust and reinvestment of the same, but providing that "all property acquired by any reinvestment to be held under the terms and conditions of the trust created by this paragraph"; (3) the right to remove the trustee and substitute another, which was never exercised; (4) the right to dispose of all the trust property by last will and testament; and (5) the right to direct any encroachment upon the corpus of the trust at any time that in her opinion the net income from the property was insufficient for her comfortable support and maintenance; but by an amendment in 1929 Mrs. Scales [fol. 100] extinguished her right to encroach upon the corpus with reference to certain bonds of the Pratt Consolidated Coal Company, which bonds constitute the major portion of the trust property.

Mrs. Scales, by last will and testament dated January 1, 1926, made disposition of the securities in the hands of the trustee, and directed that the same remain in the hands of the trustee for the benefit of certain persons named in the will. She appointed the Nashville Trust Company, a corporation, executor "as to all property which I may own in the State of Tennessee at the time of my death; and I appoint the Title Guarantee Loan & Trust Company, a corporation of Birmingham, Alabama, as executor of this will as to all property which I may own in the State of Alabama, and also as to all property which I may have the right to dispose of by last will and testament in said state."

The chancellor found and decreed that under the facts set up in the pleadings and admitted by stipulation that the securities in the hands of the Title Guarantee Loan & Trust Company, as trustee, as the time of the death of Mrs. Scales had a legal situs analagous to the situs of tangible personal property in the State of Alabama and were subject to the

death transfer or successive tax of that state. He further held and decreed that the inheritance tax law of Tennessee, in so far as it attempts to impose a tax upon transfer by a resident of Tennessee of "all intangible personal property" (Code 1259) is unconstitutional and void under the [fol. 101] facts of this cause as a violation of the due process clause of the 14th Amendment to the Federal Constitution.

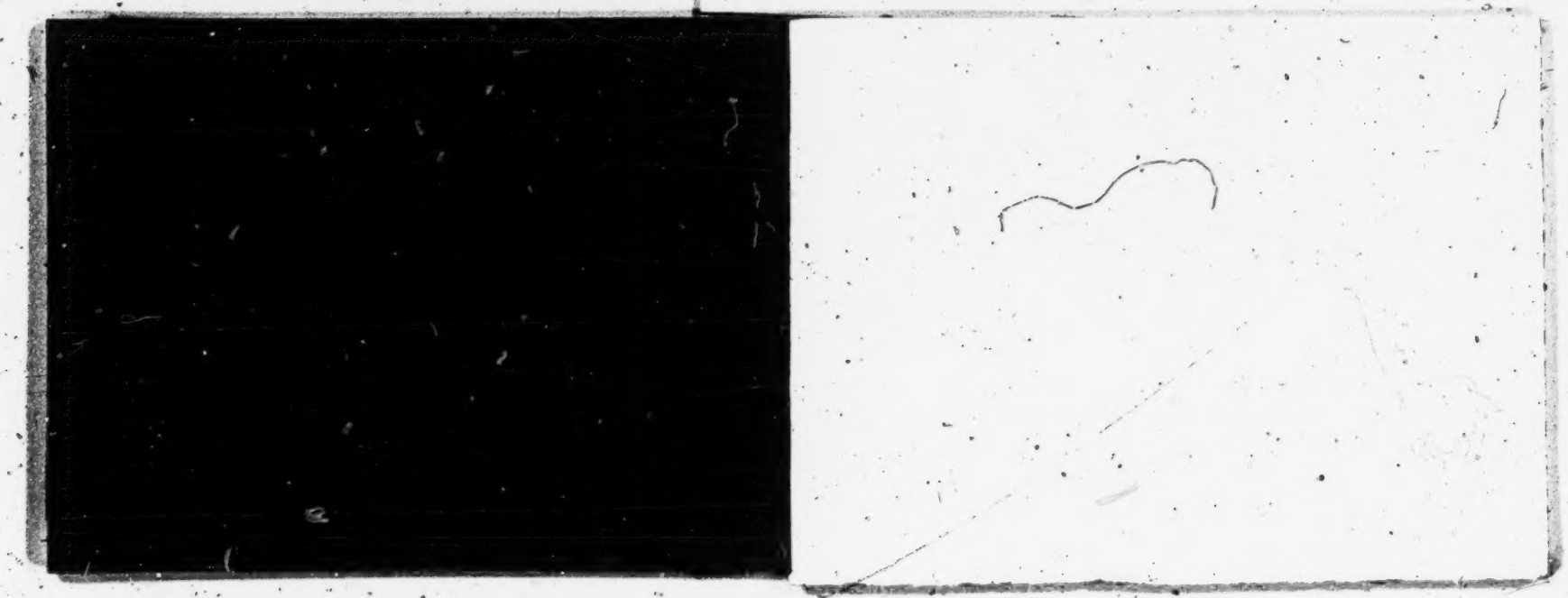
From this decree Walter Stokes, Jr., Commissioner of Finance and Taxation of Tennessee, has appealed to this court, and by proper assignments asserts that the chancellor was in error in finding and decreeing as above set out.

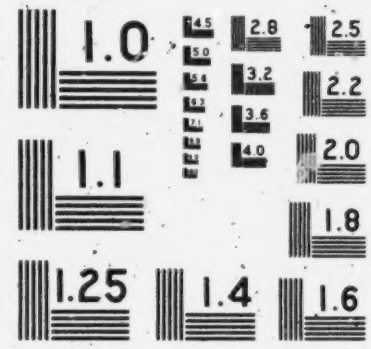
State taxation of anything not within its jurisdiction is in violation of the 14th Amendment. Farmers Loan & Trust Co. v. Minnesota, 280 U. S., 204, 74 L. ed., 371. Under the ancient maxim mobilia sequuntur personam, the situs of personal property is, generally speaking, the domicile of the owner. Blodgett v. Silberman, 277 U. S., 1, 72 L. ed., 749; First National Bank v. Maine, 284 U. S. 312, 76 L. ed. 313. In the latter case, after pointing out that due to the vast increase in the extent and variety of tangible personal property not immediately connected with the person of the owner, the maxim has gradually yielded to the law of the place where the property is kept and used, the court said:

"But in respect of intangible property, the rule is still convenient and useful, if not always necessary; and it has been adhered to as peculiarly applicable to that class of property."

And in Blodgett v. Silberman, supra, in determining the [fol. 102] taxable situs of certain intangibles, the court said:

"At common law the maxim 'mobilia sequuntur personam' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the state of the domicile or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approved itself to legal philosophic test or not."





In First National Bank v. Maine, supra, the court said:

"We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analagous to the actual situs of tangible personal property. See Farmers Loan & T. Co. Case, supra. That question heretofore has been reserved, and it still is reserved to be [fol. 103] disposed of when, if ever, it properly shall be presented for our consideration."

Were the securities here in question so used in the State of Alabama as to give them a situs analogous to the actual situs of tangible personal property? We think not. They were not employed in any business of Mrs. Scales, nor was the trustee authorized under the trust agreement to employ the securities in any business of its own, or in any other person's business. Under the terms of the trust, the trustee was to "hold, manage and look after" the securities, under the reserved powers of Mrs. Scales. The trustee had the legal title to the securities, but only for the purposes of the trust. It had no beneficial interest in the trust property, other than a commission of 5 per cent on income in compensation for its services as trustee.

In Farmers Loan & Trust Co. v. Minnesota, *supra,* the court said:

"New Orleans v. Stempel, 175 U. S. 309, 44 L. Ed. 174, 20 Sup. Ct. Rep. 110; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585, and Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. ed. 762, L. R. A. 1915C, 903, 31 Sup. Ct. Rep. 550, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they [fol. 104] have become integral parts of some local business."

As above pointed out, the securities here in question were not employed so as to become a part of any business in Alabama.

Mrs. Scales reserved the right, which she exercised, to dispose of all of the trust property by will. When she died leaving a will disposing of the trust property, the situation was the same as though there had never been a trust. The property passed under the will as the absolute property of

Mrs. Scales, a resident of Tennessee. The inheritance tax law of Tennessee with respect to residents of this State imposes a tax upon "all intangible personal property" transferred "by a will." (Code 1259-1260.) We are unable to see how on this state of facts Tennessee could be denied the right to levy and collect the tax.

Counsel for the State of Alabama lean heavily on the case of Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 74 L. ed. 180. This was a case where the State of Virginia attempted to levy an ad valorem tax upon securities in the hands of a trustee in Maryland when no person in Virginia had a present right to their enjoyment or power to remove them. The facts, briefly stated, were that the truster, a resident of Virginia, established a trust with a Maryland corporation as trustee. The trust was for the two infant sons of the truster, [fol. 105] each being given a one-half interest. The trustee was to collect the income from the securities and accumulate the net income for the benefit of the two sons, and when each of them reached twenty-five years of age to pay over to such beneficiary his interest in the accumulated sum, both principal and income. If either son died before receiving his share without issue, then the survivor took all. No provision was made for the death of both sons under twenty-five without issue. The trustee was authorized to change the investments. The truster reserved the right to revocation, but died without having exercised it. Administration of his estate was had in Virginia, and his two sons were domiciled there. Except as changed by reinvestment, the trustee had continued to hold the original securities in Baltimore, Maryland, and paid the taxes regularly demanded by the city and state on account of them. The Supreme Court of Virginia sustained the ad valorem tax levied by that state on the securities in Maryland. In reversing this holding, the Court said:

"Manifestly, the securities are subject to taxation in Maryland where they are in the actual possession of the trust company—holder of the legal title. That they are property within Maryland is not questioned. De Ganay v. Lederer, 250 U. S. 376, 382, 63 L. ed. 1042, 1044, 39 Sup. Ct. Rep. 524. Also, nobody within Virginia has present right to their control or possession, or to receive income there-[fol. 106] from, or to cause them to be brought physically within her borders. They have no legal situs for taxation

in Virginia unless the legal fiction mobilia sequuntur personam is applicable and controlling, * * *.

"Ordinarily this court recognizes that the fiction of mobilia sequuntur personam may be applied in order to determine the situs of intangible personal property for taxation. Blodgett v. Silberman, 277 U. S. 1, 72 L. ed. 749, 48 Sup. Ct. Rep. 410. But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere and ought not to be applied if so to do would result in inescapable and patent injustice whether through double taxation or otherwise (citing cases). Here, where the possessor of the legal title holds the securities in Maryland, thus giving them a permanent situs for lawful taxation there, and no person in Virginia has present right to their enjoyment or power to remove them, the fiction must be disregarded. It plainly conflicts with fact; the securities did not and could not follow any person domiciled in Virginia. Their actual situs is in Maryland and cannot be changed by the cestui que trust."

The situation in the instant cause is entirely different [fol. 107] from that presented in Safe Deposit & Trust Co. v. Virginia. Here the trust terminated on the death of Mrs. Scales, she having exercised her right to dispose of the trust property by will. She was a resident of Tennessee, as were the beneficiaries under her will. No question of double taxation is presented, as was true in the Safe Deposit case.

Our conclusion is that the decree of the chancellor must be reversed and a declaration entered here in accordance with this opinion.

By consent of the parties the costs of the cause will be paid by the Title Guarantee Loan & Trust Company and the Nashville Trust Company, as executors, who filed the bill under the Declaratory Judgemnts Act.

D. W. DeHaven, Judge.

[fol. 108] IN SUPREME COURT OF TENNESSEE

Davidson Equity. Reversed

NASHVILLE TRUST COMPANY et al.

vs.

WALTER STOKES, JR., Commissioner, et al.

DECREE—June 11, 1938

This cause came on to be heard on this June 11th, 1938, and former days of the term upon the transcript of the

record from the Chancery Court of Davidson County, Tennessee, the assignments of error, filed by appellant and the briefs filed by appellant and appellees, and arguments of counsel, upon consideration of all of which the Court is of opinion that the decree of the Chancellor should be and is reversed and that a declaratory decree should be and is entered in this Court declaring taxable in Tennessee and not taxable in Alabama for purposes of death succession or transfer taxes, the intangible property disposed of by the last will and testament of Mrs. Grace C. Scales, a deceased resident of Tennessee, for the reasons set out and stated in the written opinion is hereby made a part of this decree.

The costs of the case will be paid by the Title Guarantee Loan & Trust Company and the Nashville Trust Company as executors, who filed the bill under the Declaratory Judgments Act.

[fol. 109] IN SUPREME COURT OF TENNESSEE

[Title omitted]

PETITION FOR APPEAL

Now come the State of Alabama, by and through the State Tax Commission of the State of Alabama, and Henry S. Long, Chairman, and John P. Kohn, Sr. and W. W. Ramsey, Associates, as members of said Tax Commission of the State of Alabama, and Nashville Trust Company, a banking corporation of Tennessee, and Title Guarantee Loan & Trust Company, a banking corporation of Alabama, as Executors of the Estate of Mrs. Grace C. Scales, deceased, and respectfully shows:

I

Petitioners were the appellees in the above entitled cause in its submission to this Court on appeal from Part I of the Chancery Court of Davidson County, Tennessee, in Equity.

II

The Nashville Trust Company and the Title Guarantee Loan & Trust Company, as executors of the Estate of Mrs. Grace C. Scales, deceased, filed their bill in Part I of the

[fol. 110] Chancery Court of Davidson County, Tennessee, on the — day of ——, 1938, making Walter Stokes, Jr., as Commissioner of Finance and Taxation of the State of Tennessee, and Henry S. Long, Chairman, and John P. Kohn, Sr., and W. W. Ramsey, Associates, as members comprising the State Tax Commission of the State of Alabama, joint defendants in an action for a declaratory judgment to determine the respective rights of the States of Alabama and Tennessee to tax the succession or inheritance of certain intangible property belonging to the estate of their said testator. Each of the defendants appeared and the Tax Commission of the State of Alabama filed a cross complaint seeking to collect the sum of Two Thousand Two Hundred and Two & 42/100 -$2,202.42) Dollars, with interest, as taxes due the State of Alabama, and a declaratory decree establishing the right and power of the State of Alabama to collect an inheritance or succession tax on said intangibles and denying the right and power of the State of Tennessee to collect such a tax was rendered by said Chancery Court.

III

An appeal from said decree to the Supreme Court of the State of Tennessee was taken by the said Walter Stokes, Jr., as Commissioner of Finance and Taxation of the State of Tennessee, and the said decree of the Chancery Court of Davidson County was reversed by the Supreme Court of Tennessee on the 11th day of June, 1938, which was a final decree of the highest court of the State of Tennessee in which a decision in the suit could be had.

IV

In said cause there is drawn in question the validity of a statute of the State of Tennessee, Code of Tennessee 1932, Code Sections 1259 and 1260, on the ground of its being repugnant to Article 1, Section 14, of the Constitution of the United States, and the decision is in favor of its validity.

Wherefore, Petitioners pray for the allowance of an appeal from the Supreme Court of Tennessee to the Supreme Court of the United States in order that the decision of the said Supreme Court of the State of Tennessee may be examined and reversed, and also prays that a transcript [fol. 111] of the record and proceedings and the papers in

this case, duly authenticated by the Clerk of this Court, may be sent to the Supreme Court of the United States as provided by law.

The errors upon which each of your petitioners claims to be entitled to an appeal are those above indicated, and more fully set out in the assignments of errors filed herewith.

Dated August 30, 1938.

A. A. Carmichael, as Attorney General of the State of Alabama; Ray Rushton, as Special Attorney for the State Tax Commission of the State of Alabama; Chas. C. Trabue, Jr., as Attorney for Nashville Trust Company and Title Guarantee Loan & Trust Company as Executors of the Estate of Mrs. Grace C. Scales, Deceased, Attorneys for Petitioners and Proposed Appellants.

[fol. 112] IN SUPREME COURT OF TENNESSEE

[Title omitted]

ASSIGNMENT OF ERRORS BY THE STATE OF ALABAMA THROUGH THE STATE TAX COMMISSION OF ALABAMA

The said State of Alabama and State Tax Commission of the State of Alabama, and Henry S. Long, John P. Kohn, Sr. and W. W. Ramsey, as members of the State Tax Commission of Alabama, assign the following errors in the records and proceedings in said cause:

I

The Supreme Court of Tennessee erred in declaring and decreeing that the inheritance tax law of Tennessee, as interpreted and sought to be enforced by the taxing authority thereof, insofar as it attempts to impose a tax under the facts in this case upon intangible personal property situated in Alabama, is not unconstitutional and void and in violation of the due process clause of Section 1 of the 14th Amendment to the Constitution of the United States. The Supreme Court should have declared and decreed that the inheritance tax law of Tennessee, which provides for a tax upon transfer of "all intangible personal property" by

will of a resident of Tennessee is invalid and under said Amendment void insofar as it permits taxation of property not within the jurisdiction of the State of Tennessee.

[fol. 113] II

The Supreme Court of Tennessee erred in declaring and decreeing that the State of Alabama has no right or power to tax the intangible personal property in the possession of the Title Guarantee Loan & Trust Company as Trustee within Alabama, and that the State of Tennessee had the right to tax such under Code of Tennessee 1932, Sections 1259, 1260, despite the provisions of Article 1 of Amendment XIV of the United States Constitution, which forbids any state to tax property not within its jurisdiction.

III

The Supreme Court of Tennessee erred in declaring and decreeing that, despite the provisions of Section 1 of the XIV Amendment to the Constitution of the United States, Sections 1259, 1260, of the Code of Tennessee 1932 imposing an inheritance or succession tax upon "all intangible personal property" of the decedent Mrs. Scales in the hands of the Title Guarantee Loan & Trust Company as Trustee in the State of Alabama was valid and enforceable as to the bonds in possession of the Trustee in Alabama. The Court should have declared and decreed that for purposes of death transfer or succession taxes the situs of such intangible personal property was in Alabama where said property had acquired a legal situs analogous to the situs of personal property, and that it was taxable in the State of Alabama alone.

IV

The Supreme Court of Tennessee erred in declaring and decreeing that Sections 1259, 1260 of the Code of Tennessee 1932, being part of the Inheritance Tax Law of said State, were constitutional and valid and did not violate Section 1 of the XIV Amendment to the Constitution of the United States.

For which errors these appellants pray that the said decree of the Supreme Court of the State of Tennessee,

dated June 11, 1938, in the above entitled cause, be reversed and a decree rendered in favor of these said appellants.

Dated August 30, 1938.

[fol. 114] A. A. Carmichael, as Attorney General of the State of Alabama. Ray Rushton, as Special Attorney for the State Tax Commission of the State of Alabama.

[fol. 115] IN SUPREME COURT OF TENNESSEE

[Title omitted]

ASSIGNMENT OF ERRORS BY THE EXECUTORS OF THE ESTATE OF MRS. GRACE C. SCALES, DECEASED

The said Nashville Trust Company and Title Guarantee Loan & Trust Company as Executors of the Estate of Mrs. Grace C. Scales, deceased, assign the following errors in the records and proceedings in said cause:

I

The Supreme Court of Tennessee erred in declaring and decreeing that the inheritance tax law of Tennessee, as interpreted and sought to be enforced by the taxing authority thereof, insofar as it attempts to impose a tax under the facts in this case upon intangible personal property situated in Alabama, is not unconstitutional and void and in violation of the due process clause of Section 1 of the 14th Amendment to the Constitution of the United States. The Supreme Court should have declared and decreed that the inheritance tax law of Tennessee, which provides for a tax upon transfer of "all intangible personal property" by will of a resident of Tennessee is invalid and under said Amendment void insofar as it permits taxation of property not within the jurisdiction of the State of Tennessee.

II

The Supreme Court of Tennessee erred in declaring and [fol. 116] decreeing that the State of Alabama has no right or power to tax the intangible personal property in the possession of the Title Guarantee Loan & Trust Company as Trustee within Alabama, and that the State of Tennessee

had the right to tax such under Code of Tennessee 1932, Sections 1259, 1260, despite the provisions of Article 1 of Amendment XIV of the United States Constitution, which forbids any state to tax property not within its jurisdiction.

III

The Supreme Court of Tennessee erred in declaring and decreeing that, despite the provisions of Section 1 of the XIV Amendment to the Constitution of the United States, Sections 1259, 1260 of the Code of Tennessee 1932 imposing an inheritance or succession tax upon "all intangible personal property" of the decedent Mrs. Scales in the hands of the Title Guarantee Loan & Trust Company as Trustee in the State of Alabama was valid and enforceable as to the bonds in possession of the Trustee in Alabama. The Court should have declared and decreed that for purposes of death, transfer or succession taxes the situs of such intangible personal property was in Alabama where said property had acquired a legal situs analogous to the situs of personal property, and that it was taxable in the State of Alabama alone.

IV

The Supreme Court of Tennessee erred in declaring and decreeing that Sections 1259, 1260 of the Code of Tennessee, 1932, being part of the Inheritance Tax Law of said State, were constitutional and valid and did not violate Section 1 of the XIV Amendment to the Constitution of the United States.

For which errors these appellants pray that the said decree of the Supreme Court of the State of Tennessee, dated June 11, 1938, in the above entitled cause, be reversed and a decree rendered in favor of these said appellants.

Dated September 6, 1938.

Chas. C. Trabue, Jr., Attorney for Nashville Trust Company and Title Guarantee Loan & Trust Company, Executors of the Estate of Mrs. Grace C. Scales, Deceased.

[fol. 117] IN SUPREME COURT OF TENNESSEE

[Title omitted]

ORDER ALLOWING APPEAL

The petition of the State of Alabama, by and through the State Tax Commission of the State of Alabama, and Henry S. Long, Chairman, and John P. Kohn, Sr. and W. W. Ramsey, Associates, as members of said Tax Commission of the State of Alabama, and Nashville Trust Company, a banking corporation of Tennessee, and Title Guarantee Loan & Trust Company, a banking corporation of Alabama, as Executors of the Estate of Mrs. Grace C. Scales, deceased, for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of Tennessee, and the assignment of errors filed therewith, and the record of said cause having been considered, it is

Ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of Tennessee as prayed in said petition, and that the clerk of the Supreme Court of Tennessee shall prepare and certify a transcript of the proceedings and record in the above cause and transmit the same to the Supreme Court of the United States within — days from the date hereof.

It is further ordered that said appellants shall give good and sufficient security in the sum of Five Hundred ($500.00) dollars that they shall prosecute said appeal to effect, and if said appellants fail to make their plea good they shall [fol. 118] answer all damages and costs.

The said appellants now presenting bond in the sum of Five Hundred ($500.00) Dollars with United States Fidelity & Guaranty Company of Maryland as surety, it is

Ordered that same be and is hereby approved.

Dated this September 3, 1938.

Grafton Green, Chief Justice of the Supreme Court of Tennessee. (Seal.)

[fols. 119-120] Citation, in usual form, showing service on Walter Stokes, Jr., et al., omitted in printing.

[fols. 121-122] Bond on appeal for $500.00, approved September 7, 1938, omitted in printing.

[fol. 123] IN SUPREME COURT OF TENNESSEE

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of Said Court:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal in the above styled cause, and to include in said transcript of record the following papers and exhibits, to-wit:

1. The transcript on appeal from Part I of the Chancery Court of Davidson County, Tennessee, including specifically:

(a) The bill, including all exhibits thereto;
(b) The answer of defendant Walter Stokes, Jr., as Commissioner of Finance and Taxation of the State of Tennessee, including any exhibits thereto;
(c) The answer and cross bill of Henry S. Long and associates, members comprising the State Tax Commission of the State of Alabama, with exhibits;
(d) The amendment to the answer and cross bill of said Henry S. Long and associate members, and order permitting the filing thereof;
(e) The stipulation of all parties that the facts set up and alleged in the bill and answers of all defendants are true;
[fol. 124] (f) The decree of the Honorable R. B. C. Howell, Chancellor of Part I of the Chancery Court of Davidson County, Tennessee;
(g) All documents and papers filed on behalf of Walter Stokes, Jr., appellant, to perfect appeal to the Supreme Court of Tennessee, including specifically (1) statement of the case and (2) assignments of error;
(h) The opinion and final decree of the Supreme Court of Tennessee filed June 11, 1938;

2. The petition for appeal to the Supreme Court of the United States;
3. The assignment of errors by parties representing the State of Alabama;

4. The assignment of errors by parties representing the Nashville Trust Company and the Title Guarantee Loan & Trust Company as Executors of the estate of Mrs. Grace C. Scales, deceased;

5. The order allowing appeal and fixing the amount of bond;

6. Citation on appeal to Walter Stokes, Jr., signed by the Chief Justice of the Supreme Court of Tennessee;

7. The bond for costs of appeal and approval thereof;

8. This praecipe, with acknowledgment and waiver of counter praecipe.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 11th day of September, 1938.

Dated 30 August, 1938.

A. A. Carmichael, as Attorney General of the State of Alabama; Ray Rushton, as Special Attorney for the State Tax Commission of the State of Alabama; Chas. C. Trabue, Jr., as Attorney for Nashville Trust Company and Title Guarantee Loan & Trust Company, Attorneys for Appellants.

[fol. 125] Service of the above praecipe is accepted and acknowledged and counter praecipe waived.

This 6 day of September, 1938.

Edwin F. Hunt, Assistant Attorney General of Tennessee; Dudley Porter, Field Attorney of the State of Tennessee, Attorneys for Appellee.

[fols. 126-128] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 129] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND PART OF RECORD TO BE PRINTED—Filed September 10, 1938

Come now the appellants in the above entitled cause and adopt their respective assignments of error as their state-

ment of the points to be relied upon, and state that the whole of the record as filed is necessary for the consideration of the case.

Dated this 6th day of September, 1938.

A. A. Carmichael, as Attorney General of the State of Alabama; Ray Rushton, as Special Attorney for the State Tax Commission of the State of Alabama; Chas. C. Trabue, Jr., as Attorney for Nashville Trust Company and Title Guarantee Loan & Trust Company, Executors of the Estate of Mrs. Grace C. Scales, Deceased, Counsel for Appellants.

[fol. 130] [File endorsement omitted.]

Endorsed on cover: File No. 42,824. Tennessee Supreme Court. Term No. 339. Henry S. Long, Chairman, and John P. Kohn, Sr., and W. W. Ramsey, as Members Comprising the State Tax Commission of the State of Alabama, et al., appellants, vs. Walter Stokes, Jr., as Commissioner of Finance and Taxation of the State of Tennessee. Filed September 10, 1938. Term No. 339, O. T., 1938.

BLANK

PAGE

BLANK

PAGE

FILE COPY

MOTION FILED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 339

HENRY S. LONG, CHAIRMAN, AND JOHN P. KOHN, SR., AND W. W. RAMSEY, AS MEMBERS COMPRISING THE STATE TAX COMMISSION OF THE STATE OF ALABAMA, ET AL.,

Appellants,

vs.

WALTER STOKES, JR., AS COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

MOTION FOR LEAVE TO FILE STATEMENT AS TO JURISDICTION AND STATEMENT AS TO JURISDICTION.

A. A. CARMICHAEL,
Attorney General of Alabama;
RAY RUBBTON,
CHAS. C. TRABUE, JR.,
Counsel for Appellants.

BLANK

PAGE

INDEX.

Subject Index.

Table of Cases Cited.

Statutes Cited.

the United States the statement as to jurisdiction heretofore deposited with the Clerk on September 10, 1938.

A. A. CARMICHAEL,
Attorney General, State Capitol,
Montgomery, Alabama;
RAY RUSHTON,
Special Attorney for State Tax
Commission of the State of Alabama,
Bell Building, Montgomery, Alabama;
CHAS. C. TRABUE, JR.,
Attorney for Nashville Trust Company
and Title Guarantee Loan & Trust Company,
Executors of the Estate of Mrs.
Grace C. Scales, deceased, American
Trust Bldg., Nashville, Tenn.,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 339

STATE OF ALABAMA, BY AND THROUGH ITS STATE TAX COMMISSION, AND HENRY S. LONG, JOHN P. KOHN, SR., AND W. W. RAMSEY, MEMBERS THEREOF, AND NASHVILLE TRUST COMPANY AND TITLE GUARANTEE LOAN & TRUST COMPANY, AS EXECUTORS OF THE ESTATE OF MRS. GRACE C. SCALES, DECEASED,

Appellants,

vs.

WALTER STOKES, JR., AS COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE,

Appellee.

STATEMENT OF BASIS ON WHICH THE APPELLANTS CONTEND THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE DECREE APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12.

Pursuant to Supreme Court Rule 12, paragraph 1, the above appellants file this their statement showing the basis on which said appellants contend that the Supreme Court

has appellate jurisdiction to review on appeal the judgment appealed from herein as follows:

I.

The statute believed to sustain appellate jurisdiction is Section 237 of the Judicial Code of the United States, Section 344 of Title 28 of the United States Code, which provides that "a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity * * * may be reviewed by the Supreme Court", and further providing that "if an appeal be improvidently sought and allowed under this Section in a case where the proper mode of invoking a review is by writ of certiorari * * * the papers whereon the appeal was allowed shall be regarded and acted on as a petition for certiorari."

II.

The judgment appealed from was entered on the 11th day of June, 1938, as appears from page 108 of the record herein, and has been ordered published in Volume 173 of Tennessee Reports.

III.

The application for an appeal was presented on the 30th day of August, 1938, as appears from page 109 of the record herein.

IV.

The appeal herein is from a decree of the Supreme Court of Tennessee in a civil case in equity, rendered pursuant to the Declaratory Judgments Act of the State of Tennessee,

Code of Tennessee 1932, Sections 8835-42. The original bill was filed in the Chancery Court of Davidson County, Tennessee, by the Nashville Trust Company, a Tennessee corporation, and the Title Guarantee Loan & Trust Company, an Alabama corporation, as Executors of the Estate of Mrs. Grace C. Scales who died a resident of Tennessee, against Walter Stokes, Jr. as Commissioner of Finance and Taxation of the State of Tennessee and Henry S. Long and others, members of the State Tax Commission of Alabama, alleging that the taxing authorities of both States were seeking to collect inheritance and death transfer taxes on certain stocks and bonds held in trust since 1917 by the Alabama executor within the State of Alabama. The bill alleged that taxation by both states upon the same property was in violation of the 14th Amendment of the Constitution of the United States and prayed for a declaratory decree as to whether the State of Alabama or the State of Tennessee was entitled to collect inheritance taxes, and to have determined what taxes could be collected by each State.

The State of Tennessee by its Commissioner of Finance and Taxation appeared and asserted that under the inheritance tax law of Tennessee, Code of Tennessee 1932, Sections 1259 and 1260, a tax was levied upon "all of the property" of which Mrs. Scales died possessed, and that since she was domiciled in Tennessee the stocks and bonds held in trust for her by the Alabama trustee were nevertheless taxable in Tennessee. The State of Alabama appeared by and through its Tax Commission and the members thereof, asserted that under the trust agreement the stocks and bonds had acquired a *situs* analogous to the *situs* of tangible personal property for taxation in the State of Alabama, and it made its answer a cross bill and sought to collect the sum of two thousand two hundred two & 42/100 ($2202.42) dol-

lars, with interest, as inheritance tax due the State of Alabama. The Chancery Court decreed that the right and power of taxation rested in Alabama alone, and that the attempt to impose a tax upon transfers by a resident of Tennessee of "all intangible personal property" (Code, Section 1259) is unconstitutional and void under the facts of this case and is a violation of the due process of law clause to the 14th amendment to the Federal Constitution (R. 81). The Commissioner of Finance and Taxation of the State of Tennessee took an appeal to the Supreme Court of Tennessee, assigning as error the Chancellor's decree based upon the unconstitutionality of the Tennessee statute as a violation of the due process of law clause of the 14th Amendment (R. 88) and the Supreme Court of Tennessee reversed the decree of the Chancellor and rendered one establishing the right of the State of Tennessee to tax the inheritance of the bonds, stocks and mortgage participation in Alabama, and holding that the Tennessee inheritance tax law was not in violation of the 14th Amendment, and further that the State of Alabama had no right or power to tax the said stocks, bonds and mortgage participations. This appeal is from the final decree of the Supreme Court of Tennessee to review said decree as appears from page 108 of the record herein.

V.

The cases believed to sustain the jurisdiction are as follows:

N. C. & St. L. R. R. v. *Wallace*, 288 U. S. 249, 77 L. Ed. 730;

Farmers Loan & Trust Co. v. *Minnesota*, 280 U. S. 204, 74 L. Ed. 371;

Board of Liquidation v. *La.*, 179 U. S. 636, 45 L. Ed. 352;

Hays v. *Pacific Mail S. S. Co.*, 17 How. 596, 15 L. Ed. 254;

Safe Deposit & Trust Co. v. *Va.*, 280 U. S. 83, 74 L. Ed. 180.

Dated this 6th day of September, 1938.

Respectfully submitted,

A. A. CARMICHAEL,
Attorney General of the State of Alabama;

RAY RUSHTON,
Special Attorney for the State Tax Commission of the State of Alabama;

CHAS. C. TRABUE, JR.,
Attorney for Nashville Trust Company and Title Guarantee Loan & Trust Company, Counsel for Appellants.

EXHIBIT "A".

For Publication, DeHaven, Judge.

Filed June 11th., 1938.

David S. Lansden, Clerk.

Davidson Equity.

NASHVILLE TRUST COMPANY et al.

vs.

WALTER STOKES, Commissioner, et al.

Opinion.

The question to be determined in this cause is the taxable situs of certain intangible personal property belonging to Mrs. Grace C. Scales, a resident of Tennessee, and placed by her in the hands of the Title Guarantee Loan & Trust Company, an Alabama corporation with its principal place of business at Birmingham in that State, under a trust agreement executed by her in December, 1917, and amended in 1929, naming her son and daughter as beneficiaries.

Mrs. Scales was domiciled in Tennessee for many years and until the time of her death in 1936. Both the State of Tennessee and the State of Alabama asserted the right to levy and collect inheritance or death transfer taxes on the intangibles in the hands of the trustee in Alabama. The bill herein was filed under the Declaratory Judgments Act, and the declaration sought is which of these states is entitled to levy and collect such taxes on the property in question. It is agreed that both States may not tax the property.

It appears that the Title Guarantee Loan & Trust Company had possession of the securities here involved, as trustee, under the provisions of the will of a brother of Mrs. Scales, by the terms of which the securities became the property of Mrs. Scales on the death of the widow of the brother. These securities were never taken from the physi-

cal possession of the trustee of Mrs. Scales, but remained in its possession under the terms of the trust agreement executed by Mrs. Scales in December, 1917. Under this agreement, Mrs. Scales did "grant, sell, transfer, assign and deliver" to the trustee the securities in question, with power to "hold, manage and look after" the same. Mrs. Scales reserved to herself (1) the net income for life; (2) the right to direct the sale of any or all the securities in the trust and reinvestment of the same, but providing that "all property acquired by any reinvestment to be held under the terms and conditions of the trust created by this paragraph"; (3) the right to remove the trustee and substitute another, which was never exercised; (4) the right to dispose of all the trust property by last will and testament; and (5) the right to direct any encroachment upon the *corpus* of the trust at any time that in her opinion the net income from the property was insufficient for her comfortable support and maintenance; but by an amendment in 1929 Mrs. Scales extinguished her right to encroach upon the *corpus* with reference to certain bonds of the Pratt Consolidated Coal Company, which bonds constitute the major portion of the trust property.

Mrs. Scales, by last will and testament dated January 1, 1926, made disposition of the securities in the hands of the trustee, and directed that the same remain in the hands of the trustee for the benefit of certain persons named in the will. She appointed the Nashville Trust Company, a corporation, executor "as to all property which I may own in the State of Tennessee at the time of my death; and I appoint the Title Guarantee Loan & Trust Company, a corporation of Birmingham, Alabama, as executor of this will as to all property which I may own in the State of Alabama, and also as to all property which I may have the right to dispose of by last will and testament in said state."

The chancellor found and decreed that under the facts set up in the pleadings and admitted by stipulation that the securities in the hands of the Title Guarantee Loan & Trust Company, as trustee, at the time of the death of Mrs. Scales had a legal *situs* analagous to the *situs* of tangible personal property in the State of Alabama and were subject to the

death transfer or successive tax of that state. He further held and decreed that the inheritance tax law of Tennessee in so far as it attempts to impose a tax upon transfer by a resident of Tennessee of "all intangible personal property" (Code 1259) is unconstitutional and void under the facts of this cause as a violation of the due process clause of the 14th Amendment to the Federal Constitution.

From this decree Walter Stokes, Jr., Commissioner of Finance and Taxation of Tennessee, has appealed to this court, and by proper assignments asserts that the chancellor was in error in finding and decreeing as above set out.

State taxation of anything not within its jurisdiction is in violation of the 14th Amendment. Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S., 204, 74 L. Ed., 371. Under the ancient maxim *mobilia sequuntur personam*, the *situs* of personal property is, generally speaking, the domicile of the owner. Blodgett *v.* Silberman, 277 U. S. 1, 72 L. Ed., 749; First National Bank *v.* Maine, 284 U. S. 312, 76 L. Ed., 313. In the latter case, after pointing out that due to the vast increase in the extent and variety of tangible personal property not immediately connected with the person of the owner, the maxim has gradually yielded to the law of the place where the property is kept and used, the court said:

> "But in respect of intangible property, the rule is still convenient and useful, if not always necessary; and it has been adhered to as peculiarly applicable to that class of property."

And in Blodgett *v.* Silberman, *supra*, in determining the taxable *situs* of certain intangibles, the court said:

> "At common law the maxim '*mobilia sequuntur personam*' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the state of the domicile or elsewhere, and

is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approved itself to legal philosophic test or not."

In First National Bank *v.* Maine, *supra*, the court said:

"We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. See Farmers Loan & T. Co. Case, *supra*. That question heretofore has been reserved, and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration."

Were the securities here in question so used in the State of Alabama as to give them a *situs* analogous to the actual *situs* of tangible personal property? We think not. They were not employed in any business of Mrs. Scales, nor was the trustee authorized under the trust agreement to employ the securities in any business of its own, or in any other person's business. Under the terms of the trust, the trustee was to "hold, manage and look after" the securities, under the reserved powers of Mrs. Scales. The trustee had the legal title to the securities, but only for the purposes of the trust. It had no beneficial interest in the trust property, other than a commission of 5 per cent on income in compensation for its services as trustee.

In Farmers Loan & Trust Co. *v.* Minnesota, *supra*, the court said:

"New Orleans *v.* Stempel, 175 U. S. 309, 44 L. Ed. 174, 20 Sup. Ct. Rep. 110; Bristol *v.* Washington County, 177 U. S. 133, 44 L. Ed. 701, 20 Sup. Ct. Rep. 585, and Liverpool & L. & G. Ins. Co. *v.* Board of Assessors, 221 U. S. 346, 55 L. Ed. 762, L. R. A. 1915C, 903, 31 Sup. Ct. Rep. 550, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business."

As above pointed out, the securities here in question were not employed so as to become a part of any business in Alabama.

Mrs. Scales reserved the right, which she exercised, to dispose of all of the trust property by will. When she died leaving a will disposing of the trust property, the situation was the same as though there had never been a trust. The property passed under the will as the absolute property of Mrs. Scales, a resident of Tennessee. The inheritance tax law of Tennessee with respect to residents of this State imposes a tax upon "all intangible personal property" transferred "by a will." (Code 1259-1260). We are unable to see how on this state of facts Tennessee could be denied the right to levy and collect the tax.

Counsel for the State of Alabama lean heavily on the case of Safe Deposit & Trust Co. *v.* Virginia, 280 U. S., 83, 74 L. Ed., 180. This was a case where the State of Virginia attempted to levy an *ad valorem* tax upon securities in the hands of a trustee in Maryland when no person in Virginia had a present right to their enjoyment or power to remove them. The facts, briefly stated, were that the truster, a resident of Virginia, established a trust with a Maryland corporation as trustee. The trust was for the two infant sons of the truster, each being given a one-half interest. The trustee was to collect the income from the securities and accumulate the net income for the benefit of the two sons, and when each of them reached twenty-five years of age to pay over to such beneficiary his interest in the accumulated sum, both principal and income. If either son died before receiving his share without issue, then the survivor took all. No provision was made for the death of both sons under twenty-five without issue. The trustee was authorized to change the investments. The truster reserved the right to revocation, but died without having exercised it. Administration of his estate was had in Virginia, and his two sons were domiciled there. Except as changed by reinvestment, the trustee had continued to hold the original securities in Baltimore, Maryland, and paid the taxes regularly demanded by the city and state on account of them. The Supreme Court of Virginia sustained the *ad valorem* tax

levied by that state on the securities in Maryland. In reversing this holding, the Court said:

> "Manifestly, the securities are subject to taxation in Maryland where they are in the actual possession of the trust company—holder of the legal title. That they are property within Maryland is not questioned. De Ganay *v.* Lederer, 250 U. S. 376, 382, 63 L. Ed. 1042, 1044, 39 Sup. Ct. Rep. 524. Also, nobody within Virginia has present right to their control or possession, or to receive income therefrom, or to cause them to be brought physically within her borders. They have no legal situs for taxation in Virginia unless the legal fiction *mobilia sequuntur personam* is applicable and controlling, * * *
>
> "Ordinarily this court recognizes that the fiction of *mobilia sequuntur personam* may be applied in order to determine the situs of intangible personal property for taxation. Blodgett *v.* Silberman, 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. Rep. 410. But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere and ought not to be applied if so to do would result in inescapable and patent injustice whether through double taxation or otherwise. (Citing cases.) Here, where the possessor of the legal title holds the securities in Maryland, thus giving them a permanent situs for lawful taxation there, and no person in Virginia has present right to their enjoyment or power to remove them, the fiction must be disregarded. It plainly conflicts with fact; the securities did not and could not follow any person domiciled in Virginia. Their actual situs is in Maryland and cannot be changed by the *cestui que* trust."

The situation in the instant cause is entirely different from that presented in Safe Deposit & Trust Co. *v.* Virginia. Here the trust terminated on the death of Mrs. Scales, she having exercised her right to dispose of the trust property by will. She was a resident of Tennessee, as were the beneficiaries under her will. No question of double taxation is presented, as was true in the Safe Deposit case.

Our conclusion is that the decree of the chancellor must be reversed and a declaration entered here in accordance with this opinion.

By consent of the parties the costs of the cause will be paid by the Title Guarantee Loan & Trust Company and the Nashville Trust Company, as executors, who filed the bill under the Declaratory Judgments Act.

D. W. DeHaven,
Judge.

(7492)

BLANK

PAGE

BLANK

PAGE

FILE COPY

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 339

STATE OF ALABAMA, by and Through Its State Tax Commission, and HENRY S. LONG, JOHN P. KOHN, SR., and W. W. RAMSEY, Members Thereof, and NASHVILLE TRUST COMPANY and TITLE GUARANTEE LOAN & TRUST COMPANY, as Executors of the Estate of Mrs. Grace C. Scales, Deceased,

Appellants,

vs.

WALTER STOKES, JR., as Commissioner of Finance and Taxation of the State of Tennessee,

Appellee.

BRIEF AND ARGUMENT OF APPELLANTS

A. A. CARMICHAEL,
Attorney General of Alabama,
CHAS. C. TRABUE, JR.,
RAY RUSHTON,
MARION RUSHTON,
WALTER KNABE,
FONTAINE HOWARD,
Attorneys for Appellants.

BROWN PRINTING CO., MONTGOMERY, ALA. 1938

BLANK

PAGE

SUBJECT INDEX

TABLE OF CASES

The Official Report of Opinion Delivered in the Court Below

Nashville Trust Co. et al v. Walter Stokes, Commissioner, et al, 173 Tenn....., 118 S. W. (2d) 228. For copy of opinion see Exhibit A, Motion as to Jurisdiction Filed in this Court Sept. 6, 1938.

Grounds on which the Jurisdiction of the Court is Invoked.

Paragraph 1 of Rule 12 has been complied with by filing in this Court on September 6, 1938, a motion for leave to file statement and a statement of jurisdiction. This document is referred to as part of this brief. The Court is also referred to pages 6 and 8 of this brief.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 339

STATE OF ALABAMA, by and Through Its State Tax Commission, and HENRY S. LONG, JOHN P. KOHN, SR., and W. W. RAMSEY, Members Thereof, and NASHVILLE TRUST COMPANY and TITLE GUARANTEE LOAN & TRUST COMPANY, as Executors of the Estate of Mrs. Grace C. Scales, Deceased,

Appellants,

vs.

WALTER STOKES, JR., as Commissioner of Finance and Taxation of the State of Tennessee,

Appellee.

BRIEF AND ARGUMENT OF APPELLANTS

STATEMENT OF THE CASE

The Facts

The admitted facts (Stipulation as to Facts, Record page 40) are as follows:

Mrs. Grace C. Scales, a married woman, wife of D. C. Scales, was a resident of the State of Tennessee and domiciled therein for many years and until the time of her death in 1936. On the 29th day of December, 1917, the said Mrs. Scales, while a resident of Tennessee, executed jointly with appellant, Title Guarantee Loan & Trust Company, a corporation under the laws of Alabama and having its office and place of business in Birmingham, in said State, an indenture or trust agreement by the terms of which she did grant, sell,

transfer and deliver to said corporation as trustee a large amount of stocks and bonds of which said appellant Title Guarantee Loan & Trust Company already had possession as trustee under the provisions of a will of a brother of Mrs. Scales, under which the same securities became the property of Mrs. Scales on the death of the widow of her brother. Said securities were never taken from the physical possession of said Trust Company at Birmingham, but after the execution of the trust indenture remained in the possession of the said Trust Company. See Exhibit A, Record pages 5-15.

By the terms of paragraphs 3 and 4 of said trust indenture (Record pages 10-13) as amended by subsequent agreement among all the parties interested, on January 11, 1929, (Exhibit B, Record pages 15-17) Mrs. Scales reserved to herself: (1) the net income for life, (2) the right to direct the sale of any or all of the property of the trust and reinvestment of the same but providing that "all property acquired by any reinvestment to be held under the terms and conditions of the trust created by this paragraph," (3) the right to remove the trustee and substitute another, which was never exercised, and (4) the right to dispose of all of the trust property "by her last will and testament" with the provision "and if she make disposition by last will and testament then the trust property is to be handled and disposed of as directed in said will," and provided further that in the event she "makes no disposition of the trust property by her last will and testament" the property was still to be held in trust for the benefit of her husband, son and daughter.

Mrs. Scales in the exercise of her reserved right to "direct" and "make disposition" of all trust property in the custody of the appellant Title Guarantee Loan & Trust Company of Birmingham as Trustee did by her last will and testament dated January 2, 1926, make disposition of said securities in the hands of said Title Guarantee Loan & Trust Company as Trustee by directing that said securities remain in the hands

of said Trustee for the benefit of her husband, son and daughter, but rearranging the portions and estate given to each (Paragraph 3 of the Trust, Record page 12 and Section 2 of will, Record page 22).

Under the terms of her will Mrs. Scales appointed the Nashville Trust Company, a corporation of Nashville, Tennessee, as Executor of all property that she owned in the State of Tennessee at the time of her death and appointed Title Guarantee Loan & Trust Company of Birmingham, Alabama, as Executor of her last will as to all property "which I may own in the State of Alabama and also property which I may have the right to dispose of by last will and testament in said State."

The appellant Nashville Trust Company after the probate of said will in Davidson County, Tennessee, qualified as Executor of said will, and after said will was also probated in Jefferson County, Alabama, appellant Title Guarantee Loan & Trust Company qualified as Executor of said estate in said State of Alabama; and letters testamentary were issued to the Nashville Trust Company by the proper court of Davidson County, Tennessee, and letters testamentary were issued to said Title Guarantee Loan & Trust Company by the proper court of Jefferson County, Alabama, the county in which Birmingham is located.

The Pleadings

The original bill in this cause was filed in the Chancery Court of Davidson County, Tennessee, by both of said executors under Sections 8835-8847, inclusive, of the Tennessee Code of 1932, known as the Tennessee Declaratory Judgments Act, for the purpose of obtaining an adjudication as to whether the State of Alabama or the State of Tennessee is entitled to collect death transfer taxes on that portion of the estate of Mrs. Scales which was in the possession of appellant

Title Guarantee Loan & Trust Company as Trustee at Birmingham, Alabama, at the time of her death. It is admitted that at the time of the creation of the trust, and at the time of the execution of the will neither the State of Alabama nor the State of Tennessee had any form of succession tax.

Walter Stokes, Jr., as Commissioner of Finance and Taxation of the State of Tennessee and Henry S. Long, Chairman, John P. Kohn, Sr. and W. W. Ramsey, Associates, as the State Tax Commission of Alabama, were made parties respondent. Service was had upon Mr. Stokes, who filed an answer asserting the right of Tennessee to collect, under the Tennessee inheritance tax law, Code of Tennessee 1932, Sections 1259-60, a tax upon "all intangible personal property" transferred "by a will", and including specifically the securities held in Alabama. The Alabama Commission, under the authority of the Governor of Alabama and with the approval and active advocacy of the Attorney General of Alabama, filed an answer and a cross bill seeking a decree permitting the collection by Alabama of $2,202.42 as inheritance tax on the assets held in Alabama. (Record page 29.) All of the parties invoked Section 1 of the Fourteenth Amendment to the Constitution of the United States.

All facts set up in the pleadings were admitted by stipulation between the parties (Record page 40). The Chancellor after finding substantially the facts set out above made the following decree:

"It is accordingly ordered, adjudged and decreed by the court that the State of Alabama may legally impose a death transfer or succession tax on said securities held at the time of Mrs. Scales' death in trust by the Title Guarantee Loan & Trust Company as Trustee, and that only one state may impose death transfer taxes on this portion of said estate.

"It is further ordered, adjudged and decreed that the inheritance tax law of Tennessee, insofar as it attempts to im-

pose a tax upon transfers by a resident of Tennessee of 'all intangible personal property' (Code Section 1259) is unconstitutional and void under the facts of this case as a violation of the due process of law clause of the Fourteenth Amendment to the Federal Constitution." (Record page 43.)

Thereafter the Commissioner of Finance and Taxation of the State of Tennessee appealed to the Supreme Court of Tennessee and obtained a reversal and instructions that a declaration be entered in accordance therewith. The substance of the decree entered by the Supreme Court of Tennessee and here appealed from is as follows: (Record page 55)

> "A declaratory decree should be and is entered in this Court declaring taxable in Tennessee and not taxable in Alabama for purposes of death succession or transfer taxes, the intangible property disposed of by the last will and testament of Mrs. Grace C. Scales, a deceased resident of Tennessee, for the reasons set out and stated in the written opinion is hereby made a part of this decree."

This appeal is brought to this Court by the joint executors of the estate of Mrs. Scales and the taxing authorities of the State of Alabama, under Section 237 of the Judicial Code of the United States (Section 344 of Title 28 to the United States Code) which provides not only for appeal, but for certiorari if that be the proper remedy.

SPECIFICATION OF ASSIGNED ERRORS

The appellants, while joining in the appeal from the declaratory decree of the Supreme Court of Tennessee, have, because of their separate relations, assigned separate errors. The Trust Companies, as executors, appeal from the decree because it permits Tennessee to tax property located in Alabama. Appellant The Alabama Tax Commission, appeals

because by the decree the Commission is denied the right to tax property located in Alabama.

The language of these assignments of errors is, however, identical. Each appellant specifies and intends to urge each assigned error. The first assignment of error as to each appellant raises the proposition that the Tennessee inheritance tax law as interpreted by the Supreme Court of Tennessee with reference to the facts in this case violates the Fourteenth Amendment because the intangible personal property is situated in Alabama, and Tennessee has no authority to tax property beyond her jurisdiction. The second assignment raises the point that the Supreme Court of Tennessee erred in holding that Alabama had no right to tax the inheritance of any of the securities. The third assignment is limited in its application to the bonds held in Alabama and does not refer to the other securities. The fourth assignment is a general attack upon Sections 1259-60 of the Tennessee Inheritance Tax Law as invalid under the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

I

A controversy within the power of this Court to review is presented by a proceeding under the Uniform Declaratory Judgments Act of Tennessee, wherein the validity of the Inheritance Tax Law of Tennessee is established and that of Alabama is denied, as applied to intangible personal property kept and used in Alabama, the Fourteenth Amendment of the United States Constitution being invoked by all parties.

Chapter 29, Tennessee Public Acts of 1923, now codified as Sections 8835-8847, Code of Tennessee 1932;
Code of Tenn. 1932, Sections 1259-60;

Revenue Acts of Ala., Art. XII, Ch. 2, Acts 1935, pages 434-441;

N. C. & St. L. R. R. Co. v. Wallace (1933), 288 U. S. 249, 77 L. Ed. 730;

Blodgett v. Silberman (1928), 277 U. S. 1, 72 L. Ed. 749;

Commonwealth of Va. v. Imperial Coal Sales Co. (1934), 293 U. S. 15, 79 L. Ed. 171;

Morehead v. Tipaldo (1936), 298 U. S. 587, 80 L. Ed. 1347.

II

A state cannot impose a tax upon the transfer on the death of the owner of property having an actual situs in other states although the owner was domiciled within its limits.

Frick v. Penna. (1925), 268 U. S. 473, 69 L. Ed. 1058;

Farmers Loan & Trust Co. v. Minn. (1930), 280 U. S. 204, 74 L. Ed. 371;

First National Bank v. Maine (1932), 284 U. S. 312, 76 L. Ed. 313.

III

Where a federal constitutional right with respect to a state tax turns upon the determination of the situs of the property taxed, it is the province of the Supreme Court to analyze the facts and ascertain whether the conclusion of the State court has adequate support in the evidence.

Johnson Oil Refining Co. v. Oklahoma ex rel Mitchell, (1933), 290 U. S. 158, 78 L. Ed. 238;

Beidler v. S. Carolina Tax Commission (1930), 282 U. S. 1, 75 L. Ed. 131.

IV

Corporate bonds, mortgages, and shares of stock "kept and used" in trust within a state acquire a situs there for taxation purposes analagous to that of tangible personal property.

New Orleans v. Stempel (1899), 175 U. S. 309, 44 L. Ed. 174;

Safe Deposit & Trust Co. v. Virginia (1929), 280 U. S. 83, 74 L. Ed. 180;

Beidler v. S. Carolina Tax Commission (1930), 282 U. S. 1, 75 L. Ed. 131;

Senior v. Braden (1935), 295 U. S. 422, 79 L. Ed. 1520;

In re Brown's Estate (1937), 247 N. Y. 10, 8 N. E. (2d) 42.

ARGUMENT

I: Jurisdiction of This Court

The jurisdiction of this Court to review proceedings under the Uniform Declaratory Judgments Act of Tennessee has already been determined.

N. C. & St. L. R. R. v. Wallace, 288 U. S. 249, 77 L. Ed. 730.

It is invoked in this instance by the trustees of Mrs. Scales' estate who have an interest not only in maintaining that under the Fourteenth Amendment the securities in Alabama shall not be taxed twice, but are also interested that Alabama, which taxes at a lower rate, shall prevail over Tennessee. The taxing authorities of Alabama are also interested because, since under the Fourteenth Amendment the securities can be taxed but once, they are by the decree of the Tennessee Supreme Court deprived of taxing them at all.

Here is a controversy in which the plan and scheme of the Declaratory Judgments Act is particularly valuable in reducing litigation and establishing a precedent for use in the "very practical matter" of taxation.

Borchard, Declaratory Judgments, pages 618-21.

The right of the executors to appeal invoking the Fourteenth Amendment is unquestionable.

First National Bank v. Maine, 284 U. S. 312, 76 L. Ed. 313.

The right of the Alabama taxing authorities is established by the procedure of this Court in *Blodgett v. Silberman,* 277 U. S. 1, 72 L. Ed. 749, and the cases heretofore cited.

II: Only One State May Tax an Inheritance

The decisions of this Court have now established beyond the necessity of argument the proposition that the transfer of any specific property from the dead to the living is a single event and may be taxed by only one state.

First National Bank v. Maine, 284 U. S. 312, 76 L. Ed. 313.

III: This Court Will Determine Facts and Law for Itself

This Court is not bound by the findings either of the Chancery Court of Davidson County or the Supreme Court of Tennessee. It will examine the record for itself, analyze the facts and ascertain what they mean.

Beidler v. S. Carolina Tax Commission, 282 U. S. 1, 75 L. Ed. 131.

IV: Intangibles "Kept and Used" in Trust Within a State are Taxable There Upon Inheritance

While it is true that intangible personal property normally takes a situs at the domicile of its owner, it may acquire a situs in another jurisdiction. This question heretofore has been reserved by this Court to such time as it may properly be presented for consideration.

First National Bank v. Maine, 284 U. S. 312, at 331, 76 L. Ed. 313, at 321.

Appellants and appellee are in substantial agreement up to this point, but from this point our contentions divide. The learned counsel for Tennessee contend that the only possible exception to the general maxim of *mobilia sequuntur personam* is where the intangibles become integral parts of some local business in a state other than the domicile,—their contention as we understand it, being, that the local business must be an active business of some sort (never as yet attained by any litigant), and that no special trust, however established in a foreign state, is a part of a "local business."

Our contention is that under its recent decisions this Court will deal with actualities and not ancient fictions. The true rule deducible from the decisions, it seems to us, is that the maxim *mobilia sequuntur personam* has gradually yielded, for intangible as well as tangible personal property, "to the law of the place where the property is kept and used."

> *First National Bank v. Maine,* 284 U. S. 312, at 329, 76 L. Ed. 313 at 320.

In the present case the stocks, bonds and mortgage participations have been kept in Alabama for 33 years and used in the only way in which they can be used, that is, kept safely and when the due dates come around interest and principal promptly collected by the trustee who, in reality, is an agent for that purpose in Alabama. While this court has not yet put out a case "on all-fours" with this case, it has noted a "progressive application" of the principle we here contend for. In *Burnet v. Brooks,* 288 U. S. 378 at 401, 77 L. Ed. 855, this Court said:

"As pointed out in the opinion in the First Nat. Bank case, the principle has had a progressive application. In *Louisville & J. Ferry Co. v. Kentucky,* 188 U. S. 385, 47 L. Ed. 513, 23 S. Ct. 463 the question related to a ferry franchise granted by Indiana to a Kentucky corporation which Kentucky attempted to tax. Despite the fact that the tax was laid upon

a property right belonging to a domestic corporation, the Court held that the Fourteenth Amendment precluded the imposition. Id. p. 398. In *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S. 194, 50 L. Ed. 150, 26 S. Ct. 36, 4 Ann. Cas. 493, the principle was applied to the attempted taxation by Kentucky of tangible personal property which was owned by a domestic corporation but had a permanent situs in another State. The Court decided that where tangible personal property had an actual situs in a particular State, the power to subject it to state taxation rested exclusively in that State regardless of the domicile of the owner. By *Frick v. Pennsylvania,* 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603, 42 A. L. R. 316, the rule became definitely fixed that as to tangible personal property the power to impose a death transfer tax was solely in the State where the property had an actual situs, and could not be exercised by another State where the decedent was domiciled. See *First Nat. Bank v. Maine,* supra (284 U. S. p. 322, 76 L. Ed. 316, 52 S. Ct. 174, 77 A. L. R. 1401). The decision in *Farmers Loan & T. Co. v. Minnesota,* 280 U. S. 204, 74 L. Ed. 371, 50 S. Ct. 98, 65 A. L. R. 1000, supra, overruling *Blackstone v. Miller,* 188 U. S. 189, 47 L. Ed. 439, 23 S. Ct. 277, carried forward the principle by applying it to intangibles. The Court was of the opinion that "the general reasons declared sufficient to inhibit taxation of them [tangibles] by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment." 280 U. S. pp. 211, 212, 74 L. Ed. 374, 375, 50 S. Ct. 98, 65 A. L. R. 1000."

In analyzing the facts we wish to draw at the outset a distinction between those which indicate an intention to keep and use the property within the State of Alabama and those

which are merely incidents of the manner in which the beneficial rights are to be exercised and enjoyed. We attach more significance to the keeping and using of the securities in Alabama, the impossibility of removing them or their reinvested replacements from Alabama, than to what was to become of the income from the securities and whether encroachment, reinvestment or the right to remove the trustee or to dispose of the trust property by will were reserved to the settlor. We think this distinction is important because of the analogy which has developed in the keeping and using of tangible personal property. It has long been settled, for example, that where freight cars are sent into another state than that of the domicile of the owner they are taxable in that other state even though they are constantly subject to the order of the owner to be returned and are in fact frequently brought back into the state of domicile. The owner of such freight cars derives the revenue from their use in other states. He can repair and replace them. He can dispose of them by will, and yet so long as he keeps and uses a certain proportion of them in foreign states they are taxable alone in that foreign state.

It is perfectly apparent from the undisputed facts in this case that the family of which Mrs. Scales was a member had from 1905 kept these securities in trust in the hands of the same trustee in Alabama, and it also appears that Mrs. Scales left them there by her last will and testament. The Supreme Court of Tennessee in the opinion supporting the judgment here appealed from, lays great stress upon the right reserved by Mrs. Scales to dispose of all the trust property by will, and states that "when she died leaving a will disposing of the trust property, the situation was the same as though there had never been a trust." (Record page 52.) Whether or not the trust was completed by the will, the fact remains that the securities were still kept and used and, even under the will, are now kept and used in Alabama.

When the duties of the Trustee in the present case are analyzed they bear a striking resemblance to the duties of the agent in *New Orleans v. Stempel,* 175 U. S. 309, 44 L. Ed. 174. There the guardian and her minor wards were citizens of the State of New York and the property which the infants owned consisted of "money in possession, on deposit or on hand, money loaned on interest, all credits and bills receivable" in the hands of an agent in Louisiana.

Mr. Justice Brewer, in delivering the opinion of the Court, said:

> "The important question was whether the property was subject to taxation. * * * Under the circumstances disclosed by the testimony, were the money and credits subject to taxation? It appears that these credits were evidenced by notes largely secured by mortgages on real estate in New Orleans; that these notes and mortgages were in the city of New Orleans in possession of an agent of the plaintiff, who collected the interest and principal as it became due and deposited the same in a bank in New Orleans to the credit of the plaintiff. * * * They are property arising from business done in the state. They were tangible property when received by the agent of the plaintiffs and, as such, subject to taxation, and their taxability was not, as the court holds, lost by their mere deposit in a bank. * * * yet as evidently the moneys were to be kept in the state for reinvestment or other use they remained still subject to taxation. * * * With regard to the notes and mortgages, it may be conceded that there is no express decision of the Supreme Court to the effect that they were taxable under the law of 1890, yet the reasoning of that court in several cases and its declarations, although perhaps only *dicta,* show that clearly in its judgment they had a local situs within the state and were by the statute of 1890 subject to taxation. * * * It is well settled that bank bills and municipal bonds are in

> such a concrete tangible form that they are subject to taxation wherever found, irrespective of the domicile of the owner. * * * Notes and mortgages are of the same nature and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a state may not declare that if found within its limits they shall be subject to taxation."

The word "trust" in its principal and broader sense embraces a multitude of relations, duties and responsibilities. One definition of a trustee is "a person in whom some estate, interest or power in or affecting a property of any description is vested for the benefit of another." This definition embraces all trusts.

Perry, On Trusts, Section 1.

The trust indenture between Mrs. Scales and the Trust Company at Birmingham created a trust *inter vivos* as distinguished from a testamentary trust. Notwithstanding the fact that she reserved the income from her property so long as she lived, the trust took effect immediately upon its execution and the delivery of the securities to the trustee and so long as she lived it was as to the corpus of the estate irrevocable. It was in no sense a mere temporary deposit of the securities in Alabama. It could not possibly terminate so long as she lived and even at her death it could not terminate unless she by her will directed otherwise.

The contention of appellee is that notwithstanding the trust instrument and the actual location of the securities in Alabama, and notwithstanding the legal title to the securities was vested in the Trust Company, whose place of business was at Birmingham, Alabama, the custody and control of the securities still remained with Mrs. Scales and remained attached to her person all of the remainder of her life and were so attached to her person at the time of her death;

that the State of Tennessee had jurisdiction over the securities at the time of her death and can now levy what is called in Tennessee an inheritance tax on all of the property embraced within the Alabama trust, even including the $200,000 of Pratt Consolidated Coal Company bonds, listed in Exhibit B (Record page 15). That contention has nothing whatever to stand on except the fiction, *mobilia sequuntur personam.*

It is the fundamental law of trusts that "the trustee is entitled to the possession of all personal securities such as bonds, notes, mortgages and certificates of stock belonging to the trust estate and he may maintain an action for their delivery even against the *cestui que trust.* All personal actions for injury to the personal property, or its detention or conversion, such as trespass, trover, detinue or replevin must be brought in the name of the trustee, although the possession is in the *cestui que trust* and although there may be a defect in the title of the trustee; for the possession of the *cestui que trust* is the possession of the trustee and in law he is not allowed to dispute the title or possession of his trustee."

Perry on Trusts, Section 330, 7th Edition, page 571.

The above is the law of trusts everywhere, so far as we have found. It seems to be the law of Tennessee (*Barkley v. Dosser,* 15 Lee 529) and the law of Alabama (*Gunn v. Barrow,* 17 Ala. 743; *Ryan v. Bibb,* 46 Ala. 323).

A recent quite interesting case is that of *Hutchison v. Ross,* 262 N. Y. 381, 187 N. E. 65, 89 A. L. R. 1007. The amount involved was large, counsel on both sides included some of the most distinguished lawyers of the United States. The opinion was written by Justice Lehman. The case was not a tax case and what is said in the opinion about taxes is obiter dicta, but the opinion and the annotation in 89 A. L. R., beginning on page 1023, are interesting reading to anyone who has the time and leisure. The interesting part of Judge Lehman's

opinion will be found on page 1016 of 89 A. L. R. and reads as follows:

> "The paucity of old judicial decisions upon conveyances in trust *inter vivos*, compared with the number of decisions upon testamentary trusts, shows that conveyances in trust *inter vivos* were comparatively rare. Thus the possible importance of drawing distinctions between the rules applicable to testamentary trusts and trusts *inter vivos* was not apparent or brought to the attention of the courts. Moreover, the maxim '*mobilia sequuntur personam*' was more rigidly and uniformly applied in earlier days. The conflict between fact and maxim then seemed less important. Today the courts cannot close their eyes to the fact that trusts of personal property and securities are created by settlors during their lifetime for many purposes, and for the first time our court is called upon to decide directly the question whether conveyances in trust of securities made *inter vivos* shall be governed by the same rules as testamentary trusts or by the same rules as other conveyances *inter vivos*."

Attention is called by Justice Lehman to the article by Professor Cavers ("Trusts *Inter Vivos* and the Conflict of Laws," 44 Harvard Law Review, 161) and the opinion proceeds as follows:

> "In *Sullivan v. Babcock*, 63 How. Pr. 120, the court, at Special Term, sustained a conveyance in trust of personal property in the State of New York on the ground that such conveyance was valid in New Jersey where the settlor resided and where the trust indenture was executed. The case was not appealed to this court and is significant mainly because the court apparently relied, as authority for the rule applied, exclusively on Story on Conflict of Laws, which asserts broadly that the laws of the owner's domicile should in *all* cases de-

termine the validity of *every* transfer, alienation, or disposition made by the owner, whether it be *inter vivos*, or *post mortem*.' Section 383. (Italics are ours.) In *Townsend v. Allen*, 59 Hun. 622, 13 N. Y. S. 73, affirmed, without opinion, 126 N. Y. 646, 27 N. E. 853, the court at General Term again assumed that this was the law, but there the decision was that the conveyance in trust was valid under the New York rules as well as under the rules of the settlor's domicile. That was true also in *Maynard v. Farmers' Loan & Trust Co.*, 208 App. Div. 112, 203 N. Y. S. 83, and this court in affirming the judgment, 238 N. Y. 592, 144 N. E. 905, expressly indicated that affirmance was not based on the reasons given in the Appellate Division."

Further on the opinion says:

"In all the affairs of life there has been a vast increase of mobility. Residence is growing less and less the focal point of existence, and its practical effect is steadily diminishing. Men living in one jurisdiction often conduct their affairs in other jurisdictions, and keep their securities there. Trusts are created in business and financial centers by settlors residing elsewhere. A settlor, regardless of residence, cannot establish a trust to be administered here which offends our public policy. If we hold that a nonresident settlor may also not establish a trust of personal property here which offends the public policy of his domicile, we shackle both the nonresident settlor and the resident trustee."

Further on in the opinion Justice Lehman says:

"In regard to other conveyances or alienations of personal property situated here, they have steadfastly applied the law of the jurisdiction where the personal property is situated. The maxim that movable personal property follows its owner is restricted to the field

> within which the state where that property is found chooses to apply other laws than its own, and modern conditions have caused a limitation of that field to narrow bounds. That is true in other jurisdictions as well as here. Where a nonresident settlor establishes here a trust of personal property intending that the trust should be governed by the law of this jurisdiction, there is little reason why the courts should defeat his intention by applying the law of another jurisdiction. Cf. Dicey on Conflict of Laws (4th Ed.) pp. 591 and 713."

Likewise the opinion of the United States Supreme Court in *Burnet v. Brooks*, 288 U. S. 378-406, 77 L. Ed. 845, is interesting as throwing light on old maxims giving way to modern conditions.

The many opinions of the Supreme Court of the United States on the question of including in a decedent's estate tax "the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated," throws some light upon the question in this case. Prior to the Joint Resolution of Congress of March 3, 1931, trusts reserving a life estate to the trustor were recognized by the Supreme Court of the United States as being valid, and it was said in the rather recent case of *Hassett v. Welch* and *Helvering v. Marshall*, Volume 82 L. Ed. Advance Opinions, 575 at page 578:

> "Notwithstanding the Treasury had ruled that a transfer of assets with a reservation of income for the donor's life came within the definition this court held otherwise. (Citing *May v. Heiner*, 281 U. S. 238, 74 L. Ed. 826.) Dissatisfied with the decision, the Government sought a reversal of it but, in three judgments, announced on March 2, 1931, the ruling was reaffirmed. (*Burnett v. Northern Trust Co.*, 283 U. S. 782, 75 L. Ed. 1412; *Morsman v. Burnett*, 283 U. S. 783, 75 L. Ed. 1412; *McCormick v. Burnett*, 283 U. S. 784, 75 L. Ed. 1413.)

In the case of *May v. Heiner*, 281 U. S. 238, 74 L. Ed. 826, the United States Supreme Court said, on page 243 of the opinion:

> "The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed *passed from her to the living;* title thereto had been definitely fixed by the trust deed. The interest therein which she possessed *immediately prior to her death* was obliterated by *that event.*" (Italics supplied.)

The court further said, on page 244 of the opinion:

> "One may freely give his property to another by absolute gift (there was no gift tax at that time) without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos,* equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with the remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute."

It will be remembered that but for the Joint Resolution of Congress of March 3, 1931, and Section 803 (a) of the Revenue Act of June 6, 1932, adding to clause (c) of Section 302 of the Revenue Act of 1926 the language, "including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of the income from the property or (2) the right to designate the person who shall possess or enjoy the property or the income therefrom," the United States Government could not now, under the ruling in *May v. Heiner,* levy

an estate tax on that part of the Scales estate involved in this trust.

There never has been anything in the law, so far as we have been able to discover, that prohibits a trustor from making a good and valid trust and reserving the income from the property to himself for life. It is simply a separation of the corpus from the income, which is perfectly legitimate. It is the corpus of the trust estate that we are here dealing with and the mere fact that Mrs. Scales reserved the income to herself for life in no way affects the situs of the property sought to be taxed. Nor would it seem from the holding in *Hassett v. Welch* that her reserved right to designate the persons who shall possess or enjoy the property or the income therefrom by will would in any way affect the trust. The property belonging to a trust estate is not necessarily taxable as a whole. Part of it may be taxable in one state and part in another. Under Mrs. Scales' Alabama trust, the corpus of the property was located in Alabama and taxable in Alabama. The income therefrom reserved to herself was purely personal, not taxable by the State of Alabama but by the state of her domicile, which was the State of Tennessee. At her death her income from the property ceased, but the corpus of the estate was under the jurisdiction of Alabama and located within the territorial limits of Alabama.

It seems very plain that if Mrs. Scales had put all of her property into the Alabama trust and at the time of her death had owned no property whatever in the State of Tennessee, that the State of Tennessee would have been absolutely without any jurisdiction to impose a succession tax or inheritance tax on her estate. So long as she lived, it could frame personal taxes, poll taxes, income taxes, and so on, and enforce them by reason of the fact that it had jurisdiction of her person. But when she died that jurisdiction ceased. At the moment of her death it became a question of property and that property could not be taxed by Tennessee for the plain and simple reason that it had no jurisdiction thereof.

Tennessee cannot enforce any lien on the securities that are in Alabama. As to them Tennessee cannot maintain any proceeding *in rem*. If allowed by this Court to impose a succession tax, it will operate and can only operate by way of a personal debt owing by Mrs. Scales to the State of Tennessee and the collection thereof will be by a process akin to garnishment of the property owned by her in Tennessee.

WHEN THE SITUS OF INTANGIBLES BECOMES ANALOGOUS TO THE ACTUAL SITUS OF TANGIBLE PERSONAL PROPERTY, THE LAW OPERATES ON BOTH ALIKE

"Taxation is a very practical matter." It now seems to be settled by a majority of the Supreme Court, and the decisions commented on above show that everyone on the Supreme Court at the time, except Judge Holmes, agreed to the proposition that all succession taxes, whether they be denominated a death tax, estate tax or inheritance tax, are enforceable only in and by the state that has jurisdiction of the property. Even in the old days when the maxim of *mobilia sequuntur personam* was applied in all of its vigor to all kinds of personal property, it was conceded that the property was governed by the law of the state in which the property was situated, and when the state in which the property was situated applied to the property, whether tangible or intangible, the maxim, it was incorporating by way of comity the law of the state of the domicile and enforcing the foreign law by way of comity or courtesy as its own law.

All of the modern decisions are to the effect that this ancient rule no longer applies. It is definitely established that it no longer applies to tangible property and the more recent decisions, which are well considered, show that the Supreme Court of the United States will only resort to the maxim of *mobilia sequuntur personam* when the proof fails to show

that intangibles have acquired a situs analogous to tangible personal property in a state other than the domicile.

The indenture executed in 1917 between Mrs. Scales and the Trust Company down at Birmingham, Alabama, was evidently intended by Mrs. Scales and by all parties concerned to be a location of a trust in Alabama. We do not claim anything outside of the documents executed by her as showing that intention, but no other intention can be gathered from the documents signed by her than that it was her purpose to establish a trust in Alabama, and lodge the securities into the custody and control of the Trust Company.

It is claimed, however, that she in these documents tied enough strings to the trust to prevent the transactions from operating as a location of the situs in Alabama. First attention is called to the reserved right to change the investment. It seems to us fairer to say that instead of revoking or annulling the situs in Alabama, this provision should be weighed in analogy to the law in reference to tangible property, for if the matter involved were tangible personal property no one would deny that its location would be in Alabama; yet under the common law Mrs. Scales would have had a right to swap it, sell it, or otherwise exchange it into other personal property and by so doing it would never have operated as a relocation of tangible property from Alabama back into Tennessee.

Likewise as to the question of disposing of the securities by will. If the matter involved had been tangible personal property in Alabama, Mrs. Scales would have had the right to make a will disposing of the same in any manner she saw fit. If she could do that as to tangible personal property, why not reserve to herself the right to dispose of intangibles located in Alabama? If the situs is analogous, the rights of the trustor are analogous. It so happens in this case that the trust was not revocable, but even had it been, the *Safe De-*

posit case decides that, not being exercised, such power of revocation had no effect upon the situs of the securities.

In appellee's answer, the officials of Tennessee seem to lay great stress on the reserved right to substitute another trustee. The appellant's answer (Record page 37) says:

> "The power to remove the trust securities at any time into another state does not give such securities a business situs within the state of the residence of the trustee."

There is nothing that can be found in the trust instrument that in so many words gave Mrs. Scales the right to transfer the securities from Alabama back to Tennessee. Our information was, however, that it would be insisted by the officials of Tennessee that the clause permitting Mrs. Scales to substitute another trustee was tantamount to authority to remove her property back to Tennessee because she could have substituted a trustee domiciled in Tennessee and that such Tennessee trustee would have the authority to bring the securities into Tennessee. It was for that reason that the Alabama respondents amended their answer by setting up the Statute of the State of Alabama to the effect that a trust estate could not be removed from Alabama except by a process through the courts.

It is not permitted to remove trust funds out of state at common law.

> 65 C. J. 699, Sec. 564, notes 76 and 80;
> Code of Alabama of 1923, Sections 10418-21.

The rule that title to personal property is to be determined by the laws of the domicile of the owner gives way whenever the statutes of the country where the property is situated, or the established policy of its laws, prescribe to its courts a different rule. 12 C. J. 472.

None of these reservations in the trust instruments have the effect of destroying the analogy to the situs of tangible property. All of the rights that were reserved by Mrs. Scales would have applied to any ownership of tangible property she might have had in Alabama. It is the law generally that no state will allow a trust estate to be removed from its jurisdiction except upon a proper showing that it is to the advantage of the *cestui que trust* to do so.

It is true that in the decisions of the United States Supreme Court and even in the *Safe Deposit* case there was some stress of the language of the trust about reserved rights. The United States Supreme Court in the case of *Burnet v. Brooks,* in commenting upon some former decisions of that court, used (288 U. S. at 391-2) this language:

> "The reference in the statement of this conclusion, to the authority of the agent to sell, invest and reinvest was by way of emphasis and is not to be taken as importing a necessary qualification."

It was at one time contended that a revocable trust instrument was nothing more than a will. But such is not the case. Perry on Trusts, Section 97, 7th Edition, p. 119.

> "The essential difference between such a trust instrument and a will is that the former acts at once to vest the interest in the beneficiaries, although their enjoyment is postponed until after the death of the settlor, but a will does not take effect until after the death of the testator and until that time vests no interest in the beneficiary."

CONCLUSION

It is respectfully submitted that when the situs of stocks and bonds and mortgages is fixed by legal process, whether by statute or contract between the parties, in a state other than the domicile of the owner such latter state is the only one that can impose a succession tax on such property. The theory that a succession tax is a personal tax applying to the owner can no longer stand. Such a tax only becomes effective after the death of the former owner and even the state of her domicile has no longer jurisdiction of the person that has died. It is the property that passes on to someone else that is taxed and it can only be taxed by the state in which it is located. This is the trend of modern decisions and the common sense view of "the very practical matter of taxation."

An attempt to apply the maxim *mobilia sequuntur personam* to a person no longer living would seem to be, in the language of the Supreme Court in the *Safe Deposit* case, "inexcusable and patent injustice."

Respectfully submitted,
A. A. CARMICHAEL,
Attorney General of Alabama,
CHAS. C. TRABUE, JR.,
RAY RUSHTON,
MARION RUSHTON,
WALTER KNABE,
FONTAINE HOWARD,
Attorneys for Appellants.

I hereby certify that three copies of the foregoing Brief and Argument were mailed, postage prepaid, to Edwin F. Hunt, Assistant Attorney General of Tennessee, at Nashville on the 29th day of December, 1938.

RAY RUSHTON,
Of Counsel for Appellants.

BLANK

PAGE

FILE COPY

Supreme Court of the United States

October Term, 1938.

No. 339

HENRY S. LONG, CHAIRMAN, AND JOHN P. KOHN, SR., AND W. W. RAMSEY, AS MEMBERS COMPRISING THE STATE TAX COMMISSION OF THE STATE OF ALABAMA, ET AL.,

Appellants,

vs.

WALTER STOKES, JR., AS COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE.

BRIEF ON BEHALF OF WALTER STOKES, JR., ETC., APPELLEE.

EDWIN F. HUNT,
Counsel for Appellee.

ROY H. BEELER,
Attorney General of Tennessee.

DUDLEY PORTER, JR.,
Of Counsel.

BAIRD-WARD—NASHVILLE

BLANK

PAGE

INDEX.

TABLE OF CASES.

STATUTES AND TEXT AUTHORITIES.

BLANK

PAGE

Supreme Court of the United States

October Term, 1938.

No. 339.

HENRY S. LONG, ET AL.,
Appellants,

vs.

WALTER STOKES, JR., ETC.,
Appellee.

BRIEF ON BEHALF OF WALTER STOKES, JR., ETC., APPELLEE.

May It Please the Court:

PRELIMINARY STATEMENT.

No complete statement of the case will be made, but we shall merely correct two erroneous statements and one omission, doubtless inadvertent, which are contained in the Statement of the Case made by adversary counsel.

The brief for appellants states that the securities in question were by the terms of the decedent's will to remain in the hands of the hands of the Title Guarantee Loan & and Trust Company at Birmingham, Alabama. (Their Brief, pp. 2-3.) The greater portion of the securities were so to be held for the benefit of decedent's children, also

residents of Tennessee, but some of the securities were bequeathed absolutely to the children by Item Two, Section Three of the will. (R., p. 23.)

The brief for appellants on page 4 says: "It is admitted that at the time of the creation of the trust, and at the time of the execution of the will neither the State of Alabama nor the State of Tennessee had any form of succession tax." This is incorrect. Not only is there no such admission in the record, but the true facts are otherwise. At the time of the creation of the trust (1917) and also at the time of the execution of the will (1926) Tennessee had a succession tax, as the courts of Tennessee could judicially notice. See Chapter 174, Acts of Tennessee of 1893; Chapter 101, section 20, Public Acts of Tennessee of 1915; and Chapter 46, Public Acts of Tennessee of 1919.

The brief for appellants does not mention that under the trust instrument as amended Mrs. Scales reserved the power to encroach upon a portion of the corpus of the securities for her support and maintenance. (R., pp. 12, 16.) There is no showing that this power was ever exercised.

A statement of facts, sufficiently full to present the question raised, will also be found in the opinion of the Supreme Court of Tennessee. This opinion, not yet officially reported, is in the record, pages 49-54, and is reported in 118 S. W. (2d), 228.

THE STATUTES.

By Article XII, Chapter 2 of the General Revenue Act of the State of Alabama, there is "levied and imposed upon all net estates passing by will, devise or under the intestate laws of the State of Alabama or otherwise, which are lawfully subject to the imposition of an estate tax by the State of Alabama, a tax equal to the full amount of the tax permissible when levied by and paid to the State of Alabama as a

credit or deduction in computing any Federal estate tax payable by such estate." (R., p. 29.)

By Section 1259 of the Code of Tennessee there is imposed an inheritance tax upon "all intangible personal property" when the transfer is made by a will of a resident of Tennessee. (R., pp. 36, 51.)

THE QUESTION.

The controlling question may be stated as follows:

Where a resident of Tennessee transfers stocks and bonds in trust to a trustee domiciled in Alabama, the settlor reserving the income for life, the power to control investments, the power to appoint a substitute trustee, limited power of encroachment upon the corpus and power to dispose of the property by will, and where the settlor dies still a resident of Tennessee, disposing of such property by will, does the state of residence of the settlor or the state of residence of the trustee have the right under the Federal Constitution to impose death transfer or succession taxes? We proceed to a consideration of this question.

SUMMARY OF ARGUMENT.

I.

The general rule is that the situs of intangible personal property for the purpose of death transfer or succession taxes is the domicile of the decedent at death. (Hereinafter discussed at page 8.)

Bullen v. *Wisconsin* (1916), 240 U. S., 625; 60 L. Ed., 830;

Blodgett v. *Silberman* (1928), 277 U. S., 1; 72 L. Ed., 749;

First National Bank of Boston v. *Maine* (1932), 284 U. S., 312; 76 L. Ed., 313.

II.

So firmly established is this general rule that in every case presented to this Court since its announcement of the principle of immunity from taxation by more than one state, the claim of a state other than the domicile to levy a succession tax upon intangibles has been rejected. (Hereinafter discussed at page 9.)

Farmers Loan & Trust Co. v. *Minnesota* (1930), 280 U. S., 204; 74 L. Ed., 371;
Baldwin v. *Missouri* (1930), 281 U. S., 586; 74 L. Ed., 1056;
Beidler v. *South Carolina* (1930), 282 U. S., 1; 75 L. Ed., 131;
First National Bank of Boston v. *Maine* (1932), 284 U. S., 312; 76 L. Ed., 313.

III.

The testamentary transfer in controversy was not of an interest in a trust or of the corpus of a trust, but was a transfer of stocks and bonds which once had been held in a trust. (Hereinafter discussed, page 12.)

Young v. *Bradley* (1880), 101 U. S., 782; 25 L. Ed., 1044;
Winters, et al. v. *March, et al.*, 139 Tenn., 496;
Bogert Trusts and Trustees, Vol. 4, sec. 997;
Perry Trusts and Trustees, Vol. 2, sec. 920.

IV.

The only *possible* exception to the general rule with reference to the situs of intangibles for purpose of inheritance taxes relates to intangibles which have acquired a business situs at a place other than at the owner's domicile. (Hereinafter discussed, page 15.)

First National Bank of Boston v. *Maine* (1932), 284 U. S., 312; 76 L. Ed., 313;
Farmers Loan & Trust Co. v. *Minnesota* (1930), 280 U. S., 204; 74 L. Ed., 371;

Liverpool & L. & G. Ins. Co. v. *Orleans Assessors* (1911), 221 U. S., 358; 55 L. Ed., 769;

Bristol v. *Washington County* (1900), 177 U. S., 133; 44 L. Ed., 701;

New Orleans v. *Stempel* (1899), 175 U. S., 309; 44 L. Ed., 174.

V.

Intangibles acquire a business situs at a place other than at the owner's domicile when they become integral parts of some local business or there is localization for the purpose of transacting business. (Hereinafter discussed, page 18.)

People, ex rel. v. *Graves* (1937), 299 U. S., 366; 81 L. Ed., 285;

State Board of Tax Assessors v. *Comptoir National D'Escompte* (1903), 191 U. S., 388; 48 L. Ed., 232;

Westinghouse Electric & Mfg. Co. v. *Los Angeles* (1922), 188 Cal., 491; 205 Pac., 1076;

Crane Co. v. *Des Moines* (1929), 208 Iowa, 164; 225 N. W., 344; 76 A. L. R., 801;

Manufacturers Trust Co. v. *Hackett* (1934), 118 Conn., 101; 170 Atl., 792;

See also extensive annotations, 76 A. L. R., 806-829, and 79 A. L. R., 344.

VI.

Assuming for the purpose of argument that the intangibles in question acquired a situs analogous to the actual situs of tangible property and that the question heretofore expressly reserved is now presented for decision, the claim of the state of domicile, and not the claim of the state where the intangibles are kept, should be sustained with respect to succession taxes for the following reasons:

(a) The states generally have asserted the right to tax all intangibles of their residents and have not attempted to tax

intangibles of non-residents. (Hereinafter discussed, page 22.)

Blodgett v. *Silberman* (1928), 277 U. S., 1, 8; 72 L. Ed., 749, 756;
First National Bank of Boston v. *Maine* (1932), 284 U. S., 312; 76 L. Ed., 313.

(b) The decisions prior to the adoption of the rule of immunity from taxation by more than one state uniformly recognized the right of the state of domicile to tax the transfer of all intangibles, including the transfer of a trust situated in another state. (Hereinafter discussed, page 25.)

Bullen v. *Wisconsin* (1916), 240 U. S., 625; 60 L. Ed., 830;
Lines Estate (1893), 155 Pa. St., 378; 26 Atl., 728;
Countess de Noailles Estate (1912), 236 Pa., 213; 84 Atl., 665;
In Re: Fulham's Estate (1923), 96 Vt., 308; 119 Atl., 433;
Douglas County v. *Kountze* (1909), 84 Neb., 506; 121 N. W., 593;
Estate of Dillingham (1925), 196 Cal., 525;
In Re: Frazier's Estate (1912), 188 N. Y. S., 189.

(c) The decisions since the adoption of the rule of immunity from taxation by more than one state have quite generally recognized the right of the state of domicile to tax the transfer of a trust situated in another state. (Hereinafter discussed, page 28.)

Guaranty Trust Co. v. *Blodgett* (1933), 287 U. S., 509; 77 L. Ed., 463;
Blodgett v. *Guaranty Trust Co.*, 114 Conn., 207, 158 Atl., 245;
Hackett v. *Bankers Trust Co.*, 122 Conn., 107, 187 Atl., 653;
In Re: Estate of Frank (1934), 192 Minn., 151; 257 N. W., 330; 96 A. L. R., 667;

In Re: Ellis' Estate (1932), 169 Wash., 581; 14 Pac. (2d), 37;

In Re: Estate of James Parmelee (1934), 7 Ohio Opinions, Ann., 455. (*Certiorari* denied, — U. S. —, 82 L. Ed., (adv.), 1035.

(d) In holding that only one state can levy death transfer or succession taxes with respect to intangible property, this Court was merely confining taxation to *one* state. It was not introducing a new concept as to the situs of property and was not transferring from one state which had exercised the power to another state which had not exercised the power, the right to levy such tax.

(e) The adoption of a rule adverse to the state of domicile would open the door to tax evasion, fraud and confusion among the states. (Hereinafter discussed, p. 32.)

ARGUMENT.

The situs of intangible personal property for the purpose of death transfer or succession taxes is, according to the general rule, the domicile of the decedent at his death.

In *Bullen* v. *Wisconsin*, 240 U. S., 625, this Court held that a fund represented by stocks and bonds which the decedent had conveyed upon certain trusts to a trust company of another state, reserving to himself the absolute power of control, may be subjected to an inheritance tax in the state of his domicile. With respect to the general rule this Court said:

> "As the states where the property is situated, if governed by the common law, generally recognize the law of the domicil as determining the succession, it may be said that, in a practical sense at least, the law of the domicil is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicil, whatever the limitations of power over the specific chattels may be, as is especially plain in the case of contracts and stock."

In *Blodgett* v. *Silberman*, 277 U. S., 1, the question of the power of the state of decedent's domicile to levy an inheritance tax again arose. The decedent resided in Connecticut. A portion of his estate was stocks and bonds which were physically kept in safety deposit boxes in New York. The stocks were of corporations foreign to Connecticut. This Court sustained the power of Connecticut to impose an inheritance tax upon such intangible property.

Another question in this case was with respect to the power of Connecticut to tax the interest which the decedent had in a partnership which was engaged in business in New York. Such partnership was a very valuable business and consisted of real estate in New York and in Connecticut, of

merchandise and of other personal property. This Court held that the interest of the decedent in the partnership was intangible personal property which was subject to a succession tax at the owner's domicile. The opinion contains the following:

> "The power of the state of a man's domicil to impose a tax upon the succession to, or the transfer of, his intangible property, even when the evidences of such property are outside of the state at the time of his death, has been constantly asserted by the legislatures of the various states."
>
> . . . . . .
>
> "At common law the maxim '*mobilia sequuntur personam*' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the state of the domicil or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not."

Since the establishment of the principle of immunity from succession taxation by more than one state, the Supreme Court has consistently sustained the claim of the state of domicile with respect to intangibles.

The general rule that the situs of intangible property for the purpose of succession taxes is the decedent's domicile has not been departed from by this Court. In recent decisions the Court has held that two states cannot, consistently with due process of law, impose a succession tax with respect to the same property. This principle, first applied to tangible property in *Frick* v. *Pennsylvania* (1925), 268

U. S., 473, has been extended to include intangible property. The significant fact is that in the development of the rule of immunity from succession taxation by more than one state, this Court has always sustained the power of the state of domicile, as an examination of the decisions since *Blodgett* v. *Silberman, supra,* will reveal.

Farmers Loan & Trust Co. v. *Minnesota* (1930), 280 U. S., 204, was the first decision of this Court definitely holding that intangible property can be made the basis of an inheritance tax by one state only. The facts in this case were: Henry R. Taylor, domiciled in New York, died testate leaving negotiable bonds and certificates of indebtedness issued by Minnesota and her political subdivisions. Some of them were registered: The decedent's will was probated and his estate administered in New York. Minnesota attempted to assess an inheritance tax upon the transfer of the bonds and certificates mentioned.

The Court applied the maxim *"mobilia sequuntur personam"* and held that the situs for taxation was in New York. The Court conceded that *Blackstone* v. *Miller,* 188 U. S., 189, was authority in support of the claim of Minnesota, but this case was expressly overruled. It is significant that the case overruled was one permitting taxation by a state which was not the domicile of the decedent.

Baldwin v. *Missouri,* 281 U. S., 586, again applied the principle of immunity from inheritance taxation by more than one state. There a testator domiciled in Illinois at the time of her death died leaving money on deposit in banks located in Missouri and also leaving United States bonds and promissory notes physically kept within Missouri. Some of the notes executed by residents of Missouri were secured by lands in that state. The Court held that the situs of these intangibles was at the domicile of the testator and that Missouri had no power to subject them to a death transfer tax. In the opinion it was said:

"We find nothing to exempt the effort to tax the transfer of the deposits in Missouri banks from the principle applied in *Farmers Loan & T. Co.* v. *Minnesota, supra.* So far as disclosed by the record the situs of the credit was in Illinois where the depositor had her domicile. There the property interest in the credit passed under her will; and there the transfer was actually taxed. This passing was properly taxable at that place and not otherwise.

"The bonds and notes, although physically within Missouri, under our former opinions were choses in action with situs at the domicile of the creditor. At that point they too passed from the dead to the living and there this transfer was actually taxed."

Beidler v. *South Carolina Tax Comm.*, 282 U. S., 1, next applied the principle with respect to a decedent who resided in Illinois and who at the time of his death was a majority stockholder in a corporation of South Carolina, which was indebted to him in a large sum upon an open, unsecured account entered upon the books of the corporation kept in South Carolina. The Court held that this debt was taxable only by the state of the domicile and that South Carolina could not impose a succession tax upon the debt.

First National Bank of Boston v. *Maine*, 284 U. S., 312, dealt with a succession tax by a state in which a corporation was domiciled when a decedent, who was a resident of another state, died owning such stock. The Court held that with respect to such transfer the state of residence of the decedent was the only state which could impose a succession tax. In the opinion at page 330, the Court said:

"Practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicile; and these considerations are greatly fortified by the fact that a large majority of the states have

adopted that rule by their reciprocal inheritance tax statutes. In some states, indeed, the rule has been declared independently of such reciprocal statutes. The requirements of due process of law accord with this view."

Thus *in every case** arising since the adoption of the rule of immunity from taxation by more than one state this Court has refused to sustain a succession tax levied on intangibles by a state other than the domicile. *In no case* has this Court ever denied to the state of domicile the power to impose a succession tax upon intangibles of a deceased resident.

The testamentary transfer in controversy was not of an interest in a trust or of the corpus of a trust but was a transfer of stocks and bonds which once had been held in a trust.

We respectfully submit there is no factor in the present case to take it out from under the general rule.

The history of the stocks and bonds prior to the creation of the trust by Mrs. Scales in 1917 cannot have anything to do with the taxable situs of the transfer at her death. At the time when Mrs. Scales created the trust in 1917 she was the absolute owner of the securities in question. Her domicile was in Tennessee and under the general maxim that "intangibles follow the person" such securities had a taxable situs only in Tennessee. The fact that during prior years these securities may have been held in certain trusts in Alabama, does not affect the fact that Mrs. Scales in 1917 owned these securities unconditionally and was a resident of Tennessee. The securities which in *Blodgett* v. *Silberman, supra,* were held taxable in Connecticut, the state of domicile, had for a long time prior to the decedent's

---

*All italics in this brief are ours unless otherwise indicated.

death been kept physically in safe deposit boxes in New York and were never in Connecticut.

For Alabama it is argued that the trust now under consideration could not be removed from Alabama, the insistence being an effort to assimilate this trust to the one held exempt from *ad valorem* taxation by Virginia in *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S., 83. This argument is based only upon a statute of Alabama (R., p. 38) which empowers the circuit court to authorize the removal of a trust estate to another state.

We emphasize that the settlor reserved the right to remove the trustee and to appoint a substitute trustee. (R., p. 13.) There was no limitation upon the place of residence of such substitute trustee. We do not understand that the statute referred to has reference to a trust estate which by express contractual provision authorizes a substitution. We construe this statute as authorizing the court to permit the removal of a trust even though the trust instrument was silent. It seems clear that such statute was not intended to render invalid a contractual provision by which the settlor reserved the right to name a substitute trustee.

However, whether the statute was applicable or not, the settlor could have removed the trust from Alabama. Either she could remove it with the approval of the court or she could remove it without the necessity of such approval. We submit that the conclusion of adversary counsel is unjustified when they refer to "the impossibility of removing them or their reinvested replacements from Alabama." (Their Brief, p. 12.)

No significance can attach to the fact that Mrs. Scales in her will disposing of these securities created new testamentary trusts with reference to the greater portion of the property. Mrs. Scales had the unlimited power to dispose of the property by will. She could have bequeathed all of the property unconditionally. By Item Two, Section

Three of her will she did bequeath a portion of it unconditionally. (R., p. 23.) No provision of her will could increase or diminish the power of either Tennessee or Alabama to tax the transfer. The transfer of all the securities is taxable by Tennessee or Alabama, unaffected by the subsequent testamentary trusts created by the will of the decedent.

The issue in the present case is not as to the taxable situs of a trust fund during the lifetime of the settlor. The issue is not even as to the situs of a trust fund for taxation upon its testamentary transfer. The question is whether the power of a state of domicile to measure a transfer tax by stocks and bonds is altered or diminished by the fact that during the lifetime of the decedent such intangibles had been held in a trust in another state *which trust terminated when the decedent died testate.*

Mrs. Scales reserved to herself the absolute management of the trust fund, the power to control investments without restraint or hindrance from the trustee. (R., p. 13.) She retained the beneficial interest in the entire net income. (R., p. 11.) She reserved the power to remove the trustee and appoint a substitute trustee as often as she saw fit, *without limitation in the trust instrument as to the residence of the trustee.* (R., p. 13.) She retained a limited power of encroachment (R., p. 16) and the absolute power of testamentary disposition. (R., p. 11.)

The purpose of this trust—its whole purpose—is obvious. It was intended to preserve intact for distribution at the decedent's death a particular estate consisting of intangibles. When the decedent died testate that purpose was fulfilled. A trust ceases when the purpose for which it was created is accomplished. *Young* v. *Bradley*, 101 U. S., 782; *Winters, et al.* v. *March, et al.*, 139 Tenn., 496. As the Supreme Court of Tennessee tersely and logically said: "Mrs. Scales reserved the right, which she exercised, to dispose of all of the trust property by will. When she died

leaving a will disposing of the trust property, the situation was the same as though there had never been a trust. The property passed under the will as the absolute property of Mrs. Scales, a resident of Tennessee." (R., pp. 52-53.)

Tennessee is not seeking to impose a succession tax upon the transfer of an interest in a trust fund, but merely to tax the transfer of certain stocks and bonds passing under the will of a deceased resident of Tennessee to legatees, also residents of Tennessee. Mrs. Scales did not transfer a trust located in Alabama from herself to her legatees. What she transferred at her death was stocks and bonds which during her lifetime had been held in trust.

The only possible exception to the general rule as to the situs of intangibles for purpose of inheritance taxes relates to intangibles which have acquired a business situs.

We have heretofore quoted from the opinion in *First National Bank of Boston v. Maine*, wherein the Court announced *"the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicile."*

To this general rule *one possible exception* was indicated. This possible exception was not announced as an actual exception but the Court merely reserved for future consideration the question of whether or not in such exceptional case the state of domicile or the state of the business situs was entitled to tax. The Court said:

> "We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. See *Farmers' Loan & T. Co.* Case, *supra* (280 U. S., 213, 74 L. Ed., 375.")

In *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S., 204, at p. 213, the Court said:

> "*New Orleans* v. *Stempel*, 175 U. S., 309, 44 L. Ed., 174, 20 Sup. Ct. Rep., 110; *Bristol* v. *Washington County*, 177 U. S., 133, 44 L. Ed., 701, 20 Sup. Ct. Rep., 585, and *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors*, 221 U. S., 346, 55 L. Ed., 762, L. R. A., 1915C, 903, 31 Sup. Ct. Rep., 550, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner *if they have become integral parts of some local business.*"

Intangibles are referred to in *Farmers Loan & Trust Co.* v. *Minnesota* as acquiring a situs for taxation other than at the domicile of their owner when they become integral parts of some local business. Let us now examine each of the cases cited in the Farmers Loan & Trust Company case as bearing upon the possible exception to the general rule.

In *New Orleans* v. *Stempel*, 175 U. S., 309, the question involved was the right of the State of Louisiana to tax certain money and credits. It appeared that the credits were evidenced by notes largely secured on mortgages on real estate in New Orleans; that these notes and mortgages were in the city of New Orleans in possession of an agent of the plaintiff who resided in New York; and that the said agent collected interest and principal as it became due and deposited the same in a bank in New Orleans to the credit of the plaintiff. The Court, holding that the credits were subject to taxation by Louisiana on the ground that they had acquired a business situs in that State, said:

> "If we look to the decisions of other states we find the frequent ruling that when an indebtedness has taken a concrete form and become evidenced by note, bill, mortgage, or other written instrument, and that written instrument evidencing the indebtedness is left within the state in the hands of an agent of the non-resident owner, to be by him used for the purposes of

collection and deposit or reinvestment within the state, its taxable situs is in the State."

In *Bristol* v. *Washington County*, 177 U. S., 133, the Court held that investments by a nonresident of the state were subject to taxation by Minnesota, when made by a resident agent who was employed to invest and reinvest moneys, at whose office the loans were made payable, and who retained the mortgages which secured them, and to whom the notes taken for the loans were returned from time to time whenever required for the purposes of renewal, collection, or foreclosure of securities, notwithstanding the fact that the notes were sent out of the state to the principal and the agent had no authority to execute satisfactions of mortgages. Mr. Chief Justice Fuller incorporated in his statement of facts the finding of the lower court which was in part as follows:

> "*Said loaning business* was so carried on by said Sophia M. Bristol by and through her said agents at the city of Stillwater, Minnesota, in the manner aforesaid until her death, in the month of August, 1894."

The Court held that the investments had acquired a business situs in Minnesota, and quoted approvingly the following from the opinion of the Minnesota Supreme Court in *Re: Jefferson*, 35 Minn., 215, 28 N. W., 256:

> "A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its situs where it is owned,—at the domicil of the creditor. The creditor, however, may give it a *business situs* elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested as a permanent business."

In *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors*, 221 U. S., 346, the Court held that Louisiana could tax the amounts due a foreign insurance company by its policy-

holders in the state for premiums on which credits of thirty and sixty days had been extended. The Court, in holding that the credits had acquired a business situs in Louisiana for purposes of taxation, said:

> "We are not dealing here merely with a single credit or a series of separate credits, but with a business. The Insurance Company chose to enter into the business of lending money within the state of Louisiana, and employed a local agent to conduct that *business.*"

We respectfully submit it is perfectly clear from a review of the three cases cited in the Farmers Loan & Trust Company case, with respect to the possible exception, that when the Court referred to "a situs analogous to the actual situs of tangible personal property" the reference was to intangibles which have acquired a business situs.

Intangibles acquire a business situs when they become integral parts of some local business or there is localization for the purpose of transacting business.

The doctrine of business situs is not a new concept. It has reference, as the decisions show, to such intangible property as is localized in some independent business. One of the best definitions of business situs is contained in *State Board of Tax Assessors* v. *Comptoir National D'Escompte*, 191 U. S., 388, 403, where the holdings of this Court in earlier cases are well summarized as follows:

> "From these cases it may be taken as the settled law of this Court that there is no inhibition in the Federal Constitution against the right of the state to tax property in the shape of credits, where the same are evidenced by notes or obligations held within the state, in the hands of an agent of the owner for the purpose of collection or renewal, with a view to new loans and carrying on such transactions as a *permanent business.*"

The concept of business situs also includes intangible property which is identified with a particular place because the exercise of the right is fixed exclusively or dominantly at that place, such as a membership in the New York Stock Exchange. This was the situation dealt with in *People ex rel.* v. *Graves*, 299 U. S., 366.

In *Manufacturers Trust Company* v. *Hackett* (1934), 118 Conn., 101, 170 Atl., 792, the Court discussed quite exhaustively the subject of business situs and said among other things the following:

> "Also the property or right must be localized in some independent business so that its substantial use and value primarily attach to and become an asset of a business outside of the state of the owner's domicile and constitute, as it were, the subject matter or stock in trade of that business."

In *Westinghouse Electric & Manufacturing Company* v. *County of Los Angeles*, 188 Cal., 491, 205 Pac., 1076, the Court after stating the general rule that intangibles are taxable at the domicile of the owner, discussed the exception to this rule where intangibles have acquired a business situs and defined the phrase "business situs" as follows:

> "If we may venture to formulate a general statement of this modification of the rule, it would be that this can only result *where the possession and control of the property right has been localized in some independent business or investment away from the owner's domicile, so that its substantial use and value primarily attach to and become an asset of the outside business.* In other words, while the nonresident may own the business, the business controls and utilizes in its own operation and maintenance the credits and income thereof."

In *Crane Company* v. *City Council of City of Des Moines*, Iowa (1929), 225 N. W., 344, it appeared that the Crane

Company was a corporation organized under the laws of Illinois, with its principal place of business and home offices in the city of Chicago. It had domesticated in Iowa and maintained an agency in the city of Des Moines. The Crane Company owned the business building in Des Moines from which was distributed a line of manufactured goods. The Company was assessed for taxation on $35,000.00, which in the main represented book accounts owing the Company for goods sold from its Des Moines office. The Des Moines agency was to collect all of the accounts and remit the same promptly to the home office at Chicago and remittances were made every week covering collections so made. The Supreme Court of Iowa, although recognizing the general rule that the situs of intangible personalty for purposes of taxation is the owner's domicile, held that the book accounts had acquired a business situs in Iowa and were properly taxable there.

The Court defined business situs as follows:

> "The term 'business situs' while of modern origin, would seem to mean what the words indicate; that is, a situs in a place other than the domicile of the owner, where such owner, through an agent, manager, or the like is *conducting a business* out of which credits or open accounts grow and are used as a part of the business of the agency."

Extensive annotations with respect to the business situs for purposes of property taxation of intangibles will be found in 76 A. L. R., 806, *et seq.*, and 79 A. L. R., 344, *et seq.* An examination of these annotations will reveal in the cases no suggestion that intangibles acquire a business situs because they are conveyed in trust.

Furthermore, an important point to be emphasized is that *in order for intangibles to acquire a business situs the business must be that of the person sought to be taxed.*

This is made clear by the decision in *Beidler* v. *South Carolina Tax Commission,* 282 U. S., 1, where this Court refused to permit South Carolina to levy an inheritance tax upon the indebtedness of a corporation to a nonresident majority stockholder. It was argued that the sum advanced to the corporation was used in business in South Carolina and had acquired a business situs in that state, but the Court pointed out that such business as was carried on in South Carolina was not the business of the decedent but the business of the borrowing corporation. In the opinion, it is said:

> "It is sought to sustain the tax by South Carolina upon the ground that the indebtedness had what is called a 'business situs' in that state and the state court adverted to this basis for the tax.
>
> . . . . . .
>
> "That the decedent was largely interested in the affairs of the corporation is apparent; he owned a majority of its stock, but nothing is shown which derogates from its existence as a corporation, transacting its business as such, with corresponding corporate rights and liabilities. The interest of the decedent as a stockholder was a distinct interest, and the estate of the decedent has been taxed by South Carolina upon the transfer of his stock according to its agreed value. With respect to the items of indebtedness of the corporation to the decedent, the latter appears upon the record simply as a creditor, with his domicile in Illinois."

The fact that the trustee as a separate legal person is carrying on its business in Alabama has nothing to do with the situs for inheritance tax purposes of a transfer by the decedent of her interest in certain securities. Mrs. Scales did not send securities into Alabama as an integral part of a business carried on by her there.

The question heretofore expressly reserved in First National Bank of Boston v. Maine need not be decided in the present case but if decided ought to be resolved in favor of the state of domicile.

This Court has expressly reserved the question of the jurisdiction of the state of "business situs" to impose a succession tax upon intangible personal property of a nonresident. *First National Bank of Boston* v. *Maine*, 284 U. S., 312, at 331. We believe that the facts of the present case do not require a determination of the question heretofore reserved. However, we desire now to present certain arguments in support of the claim of the state of domicile, assuming for the purpose of argument that the intangibles in question acquired a situs analogous to the actual situs of tangible property and that the question heretofore reserved is now necessary for decision.

The states generally have asserted the right to tax all intangibles of residents and have not attempted to tax intangibles of nonresidents.

In *Blodgett* v. *Silberman*, 277 U. S., 1, at 8, this Court pointed out that the power of the state of domicile to tax the transfer of intangibles "has been consistently asserted by the legislatures of the various states."

In *First National Bank of Boston* v. *Maine*, 284 U. S., 312, at 331, the Court said that the practical considerations dictating the desirability of a uniform general rule confining the jurisdiction to impose succession taxes as to intangibles to the state of domicile "are greatly fortified by the fact that a large majority of the states have adopted that rule by their reciprocal inheritance tax statutes."

The language of these decisions led us to investigate the statutes of all the states and the conclusions expressed in the succeeding paragraphs are based upon an actual examination of every such state statute. An effort was made in

all cases to find the latest statute of the state but we do not vouch for the entire accuracy of the statements made in view of the possibility of legislation in a state subsequent to the compilation of statutes examined. We do vouch for the general accuracy of the statements as presenting a fair picture of the whole situation.

No state which has an inheritance or succession tax has ever purported to surrender the power to tax intangibles of its own residents. No state has ever exempted from succession tax the intangibles of its own residents upon the theory that they may have acquired a business situs elsewhere.

Six states have succession tax statutes which make no effort under any circumstances to tax intangible property of nonresidents. These six states are Tennessee, Connecticut, Delaware, Massachusetts, New Jersey, and Virginia.

Twenty-one states have reciprocal exemption provisions. These provisions assert the power of the state of domicile to tax all intangibles. These reciprocal provisions surrender the power to tax intangible property of nonresidents even though it is claimed to have acquired a situs within the state, provided the state in which such nonresident resided does not endeavor to collect a tax from a resident of the reciprocal state with respect to his intangibles.

The language of many of the reciprocal provisions is identical although some of them are differently worded. As this Court said in *First National Bank of Boston* v. *Maine*, 284 U. S., at 327, the reciprocal inheritance tax statutes "make no distinction between the various classes of intangible personal property."

The twenty-one states which have reciprocal provisions are California, Florida, Idaho, Indiana, Iowa, Maine, Maryland, Michigan, Mississippi, Missouri, New Mexico, New York, North Dakota, Oregon, Pennsylvania, South Carolina,

Texas, Washington, West Virginia, Wisconsin, and Wyoming.

Nebraska has a reciprocal provision limited to stocks.

Five states have statutes which purport to reach intangible personal property having a business situs within the state. These states are Arkansas, Kentucky, North Carolina, Ohio, and Oklahoma. In addition, Colorado taxes intangibles having a business situs, provided the state of domicile did not tax.

Seven states have statutes which, with respect to nonresidents, tax "property" within the state or the jurisdiction of the state. These states are Arizona, Kansas, Louisiana, Minnesota, Montana, South Dakota, and Utah. It is obvious that these statutes are susceptible of a construction which would tax all intangibles of residents or intangibles of nonresidents having a business situs, the construction to depend upon the ultimate decision of the reserved question.

The remaining states either have no succession tax or the statutes are sufficiently peculiar to prevent general classification.

We submit that the above survey reveals just what havoc would be wrought in the field of taxation if the contention of the appellants was sustained. The vast majority of state statutes would be held, to some extent at least, to be unconstitutional. The only states left with adequate taxing statutes would be those which have either purported to tax all intangibles of residents and also intangibles of nonresidents having a business situs, or those few states which merely tax property within the jurisdiction. We think it evident that these were some of the considerations which this Court had in mind in *Blodgett* v. *Silberman*, 277 U. S., 9-10, when the Court pointed out that whether the maxim *"mobilia sequuntur personam"* is approved when submitted to legal philosophic test or not, it is fixed in the common

law of this country and of England and "*must be treated as settled in this jurisdiction.*"

The decisions prior to the "one state" rule uniformly recognized the right of the state of domicile to tax the transfer of all intangibles.

Every case which we have found decided prior to the adoption of the rule of immunity from taxation by more than one state sustains our contention that the transfer is taxable in Tennessee, the state of domicile. We have heretofore explained our view that the present transfer was one of stocks and bonds and was not a transfer of an interest in a trust. Even if there were a transfer of an interest in a trust then the subject matter of the transfer was intangible personal property which under the decisions is taxable at the domicile.

Bullen v. *Wisconsin, supra,* has heretofore been discussed (*Ante,* p. 8). Our adversaries can avoid this decision only by the argument that it has now been discarded because of the "one state rule." In several of the cases limiting the power to tax to one state, *Bullen* v. *Wisconsin* has been cited approvingly. The cases which have been disapproved were cases where a state other than the domicile had been permitted to tax.

Lines Estate (1893), 155 Pa. St., 378, 26 Atl., 728, illustrates the rule prior to *First National Bank of Boston* v. *Maine.* This case holds that where a resident of Pennsylvania transferred securities to a New York corporation as trustee, the trustor reserving the life income and the power of revocation but providing that if the trust was not revoked the securities should be transferred at the death of the trustor to certain designated beneficiaries, there was a transfer taxable in Pennsylvania when the trustor died there. The Court said:

"In view of the undisputed facts, it is strange that any question should have been seriously raised either as to the right of the commonwealth to the tax on the securities or the liability of the beneficiaries to pay their respective proportions thereof. Mr. Lines was not only the beneficial owner of the securities prior to and at the time of his decease, but, under the reserved power of modification, revocation, etc., he had absolute control of the disposition to be made of the securities upon his decease. At any time prior thereto, he could have modified or revoked the trust in favor of the beneficiaries named in the deed. It is true the legal title to the securities was in the trust company; but aside from mere compensation for its services, as custodian of the property, the company had no beneficial interest therein. In any proper sense of the term, the securities were the 'personal property' of Mr. Lines."

In *Countess de Noailles Estate* (1912), 236 Pa., 313, 84 Atl., 665, there was presented the converse situation to that found in the *Lines Estate* case. A person died domiciled in France and leaving securities held by a trustee in Pennsylvania under a trust giving the decedent absolute right of disposition. Although Pennsylvania was the state of residence of the trustee, the Court held that Pennsylvania was without power to tax these intangibles which followed the person of the owner who was domiciled elsewhere.

Douglas County v. *Kountze* (1909), 84 Neb., 506, 121 N. W., 593, deals with a trust made by a settlor residing in Nebraska who conveyed certain stocks to a trustee residing in New York and delivered the manual possession of such stocks to the trustee. The settlor in the trust deed designated the beneficiaries of the trust estate before his death but reserved the right by his will otherwise to dispose of the property. In his will the settlor disposed of the trust property which was held taxable in Nebraska, the state of domicile. The Court said:

"The record does not disclose whether Herman Kountze made a will or not. If he did and therein exercised the right which he reserved in the deed of settlement, then said beneficiaries must trace their succession through said will and by grace of the laws of Nebraska, and that devolution is subject to the inheritance tax."

Estate of Dillingham (1925), 196 Cal., 525, presents a situation substantially identical with the facts of the present case. A resident of California created a trust, the corpus of which consisted of shares of stock. Under the trust instrument the certificates of stock were turned over to a trustee in another state who was to remit the net income to the settlor during her lifetime. Upon the death of the settlor the trust terminated and the property was to be distributed by the executor of the estate of the settlor. The settlor died a resident of California and left a will by which she disposed of such stock. This was held to be a transfer taxable within California. The Court said:

"The theory upon which the inheritance tax is imposed and sustained is that the state which confers the privilege of succeeding to property may attach thereto the condition that a portion of the property shall be contributed to that state. . . .

"There can be no question in the instant case but that the transfer was accomplished through the third codicil to the testatrix's last will and testament. . . . There can be no question, it seems to us, therefore, but that the transfer of the property was accomplished by the will, the efficacy of which depended upon the authority of the state of California. In the ultimate analysis a necessary incident to the transfer of the interest depended for its efficacy upon the laws of the state of California, and was for that reason liable for the imposition by the state of a tax upon said transfer."

Decisions since the adoption of the rule of immunity from taxation by more than one state have generally recognized the right of the domicile to tax the transfer of a trust situated in another state.

In support of our contention that this Court ought to resolve the reserved question in favor of the state of domicile, let us now examine certain decisions since the announcement of the rule that only one state can levy a succession tax on intangibles. A consideration of these cases will reveal the presently accepted concept as to situs.

Guaranty Trust Co. v. *Blodgett*, 287 U. S., 509, sustained a succession tax levied by Connecticut on the transfer of stocks and bonds by an irrevocable trust deed, although the trust deed was executed in New York, the trustee was a resident of New York and the securities were kept in New York. The decedent was a resident of Connecticut.

It is true that in the opinion of this Court the business situs doctrine is not mentioned. The significant fact is that the argument was made in the Supreme Court of Connecticut that the tax could not apply for two reasons. One of the insistences of the taxpayer in the Connecticut court was that the stocks and bonds had acquired a business situs in New York and were beyond the reach of the transfer tax of Connecticut. This contention was decided adversely to the taxpayer. When the taxpayer brought the case to this Court for review he apparently abandoned the contention of business situs and merely urged that the statute seeking to levy the tax was unconstitutional as retroactive because passed subsequently to the transfer but prior to the death of the decedent.

The opinion of the Supreme Court of Connecticut is *Blodgett* v. *Guaranty Trust Co.*, 158 Atl., 245. The opinion discusses *Blodgett* v. *Silberman, supra; First National Bank of Boston* v. *Maine, supra; Bullen* v. *Wisconsin, supra*, and

other cases, and definitely sustained the right of the state of domicile.

Hackett v. *Bankers Trust Co.*, 187 Atl., 653, involved the right of Connecticut to include in the estate of the decedent for purposes of inheritance taxes stocks and bonds held in trust in New York. The trustees and beneficiaries claimed that Connecticut had no right to tax the transfers on the ground that the corpus of the trusts had acquired a business situs in New York. Under the trust instruments, the trustee in New York had the duty of managing and reinvesting the property, collecting the income therefrom, and ultimately delivering the principal as directed by the settlor. The Court, in deciding that the stocks and bonds had not acquired a business situs in New York and that their transfer was taxable in Connecticut, said:

> "Quite recently, in *Manufacturers Trust Co.* v. *Hackett* (1934), 118 Conn., 101; 170 A., 792, we had occasion to consider the question of business situs. . . . After thorough examination and discussion of the authorities relevant to the inquiry we held . . . that in order to constitute business situs 'there must be a continuous or permanent business in the state in which it is sought to establish the situs' and that the property employed 'must be localized in some independent business so that its substantial use and value primarily attach to and become an asset of a business outside of the state of the owner's domicile and constitute, as it were, the subject-matter or stock in trade of that business.' No argument has now been advanced, nor has any additional precedent been cited which inclines us to alter the view there expressed.
>
> "Under each of the trusts now under consideration funds of the settlor were intrusted to the trustee under a general duty on its part to hold, manage, invest, and reinvest the same, subject to some reserved rights of instruction and direction, collect the income and profits, and pay the net income and ultimately deliver the prin-

cipal as specified in the trust instruments, respectively. We are unable to see that this situation, any more than that presented in *Manufacturers Trust Co.* v. *Hackett*, may fairly be regarded as 'engaging or employing . . . capital in business by the decedent . . . in any sense which reason and the precedents, when broadly considered, indicate as being that contemplated in order to constitute business situs' 118 Conn., 101, at page 110; 170 A., 792, 795."

In Re: Estate of Frank, 192 Minn., 151; 257 N. W., 330; 96 A. L. R., 667, was a case where the settlor while a resident of North Dakota transferred intangible property to a Minnesota Trust Company as trustee, reserving the income for life, the power to supervise investments and to change or revoke the trust. He died domiciled in North Dakota. The highest court of Minnesota, with two Justices dissenting and the Chief Justice taking no part, sustained the right of Minnesota to levy an inheritance tax. Upon petition to rehear, the Minnesota Court reconsidered its conclusion, decided it was wrong, and with only one Justice dissenting, held that only North Dakota, the state of the decedent's domicile, could levy an inheritance tax. The Court rested its conclusion upon *First National Bank of Boston* v. *Maine*, *Blodgett* v. *Silberman* and *Bullen* v. *Wisconsin*. The gist of the opinion is contained in the following sentence:

"The involved trust property had not acquired in Minnesota, 'a situs analogous to the actual situs of tangible personal property' within the reservation of the Maine case. *It was not part of any local business conducted by Mr. Frank.*"

In Re: Ellis' Estate, 169 Wash., 581; 14 Pac. (2d), 37, was decided by the highest Court of the State of Washington on September 20, 1932 and followed the decision of this Court in *First National Bank of Boston* v. *Maine*, *supra*, on January 4, 1932. This suit involved an inheritance tax of the State of Washington levied on the transfer of certain prop-

erty held in trust. The decedent, Mrs. Ellis, had established trusts consisting of $58,000.00 in intangible property located within the state of Illinois. The beneficiaries of the trusts were to come into complete enjoyment thereof upon Mrs. Ellis' death. Mrs. Ellis at the time of her death was domiciled in the state of Washington. The executors of the will of the settlor contended that the trust property had acquired a situs in the state of Illinois and that its transfer was therefore not taxable in Washington. The Supreme Court of Washington, while conceding that under the trust instruments executed by Mrs. Ellis the Illinois trustee had large powers and exercised considerable control over the trust property, ignored the executors' contention that the property had acquired a business situs in Illinois and held that the transfer was taxable by the state of Washington.

In Re: Estate of James Parmelee, decided by the Probate Court of Cuyahoga County and reported in 7 Ohio Opinions, Ann., 455, involves a situation quite similar to the case at bar. James Parmelee, a nonresident of the state of Ohio, conveyed to a trust company domiciled in Ohio certain intangible personal property. The trustee was to make investments only as the settlor should direct in writing. The settlor reserved during his life the right to revoke the trust and the trust terminated with death of the settlor. An effort by Ohio to impose a transfer tax upon the death of the settlor was defeated, the Court holding that the intangible property conveyed in trust did not acquire a business situs in that state. On behalf of the Tax Commission of Ohio a writ of *certiorari* was sought in this Court and the writ was dismissed, upon argument it appearing "that the judgment sought to be reviewed rests upon a non-Federal ground adequate to support it." This was No. 215, October Term, 1937, the writ being dismissed. — U. S., —, 82 L. Ed., (Advance), 1035.

First National Bank of Boston v. Maine, supra, merely confines succession taxation to one state.

We submit that when this Court in *First National Bank of Boston* v. *Maine, supra,* and other cases laid down the rule that only one state can levy a succession tax upon intangible property the Court was not introducing a new concept as to the situs of property. It was not intended to transfer the right to levy a succession tax from one state which had exercised the power to another state which had not exercised the power. Yet as we understand the contention of our adversaries their insistence is that a power which belonged to the state of domicile prior to *First National Bank of Boston* v. *Maine* now belongs to the state where the trust is situated. Apparently they take the position that the right now claimed for the state of Alabama results from certain language used in *First National Bank of Boston* v. *Maine* and other cases indicating a *possible* exception to the general rule. They cite no case either before or since this decision where the state of domicile has been denied the right to tax the transfer which results when a settlor who has created a trust, reserving the life estate and the power of disposition, makes a will transferring such property.

First National Bank of Boston v. *Maine, supra,* merely confined succession taxes to one state and as the opinion says:

> "Practical consideration of wisdom, convenience and justice alike dictate the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicile."

The adoption of a rule adverse to the state of domicile would open the door to tax evasion, fraud and confusion.

We are confident that this Court will not look with favor upon any rule which would permit a resident of one state

to accumulate property and enjoy the protection of its government and then transfer his intangibles to some other state, subject to his own right of testamentary disposition, for the purpose of enabling his heirs or beneficiaries to avoid an inheritance tax in the state of decedent's domicile. This would be the practical effect of the rule for which our adversaries are contending. The approval of a trust device to create a "business situs" for inheritance tax purposes in a state other than the domicile of the settlor would lead immediately to the transfer of jurisdiction from the state of domicile to some other state.

Furthermore, if the settlor can reserve the life income, the power of encroachment, the absolute control over investments, the right to name a substitute trustee and the power to dispose of his property at his death, then a person could transfer his intangibles from jurisdiction to jurisdiction by the use of a trust agreement. The conflict and discord between the states which would result are obvious. This Court was originally moved to announce the rule of immunity from taxation by more than one state in order to prevent the injustice of double taxation and the resulting friction between the states. It would be amazing if a principle announced to prevent taxation in two or more jurisdictions should now be extended and applied to permit a person residing all the while in one locality, accumulating his property there and enjoying the protection of its laws, to move his intangibles from place to place for the purpose of avoiding inheritance tax. The inevitable tendency of such a rule would be to create controversies between the state of domicile and the state of business situs as to the existence of the asserted business situs.

We call attention to the recent decision of *First Bank Stock Corp.* v. *Minnesota*, 301 U. S., 234; 81 L. Ed., 1061, which is an *ad valorem* tax case and not relevant except the following general statement of the Court:

"*Mobilia sequuntur personam*, which has won unqualified acceptance when applied to the taxation of intangibles, *Blodgett* v. *Silberman*, 277 U. S., 1, 9, 10; 72 L. Ed., 749, 756, 757; 48 St. Ct., 410, states a rule without disclosing the reasons for it. But we have recently had occasion to point out that enjoyment by the resident of a state of the protection of its laws is inseparable from the responsibility for sharing the costs of its government, and that a tax measured by the value of rights protected is but an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits." (Page 1065.)

Authorities relied on by appellants are distinguishable.

We submit that every case cited and relied upon by adversary counsel is distinguishable and that they cite no case, the holding or a dictum of which sustains their contention. Most of the cases referred to in their brief have heretofore been discussed. Those not heretofore mentioned include the following:

New Orleans v. *Stempel*, 175 U. S., 309, relied upon by appellants, involved the right of Louisiana to impose an *ad valorem* tax upon certain intangible property which the Court declared to be "property arising from business done in the state."

The stocks and bonds held in the trust created by Mrs. Scales were not property arising from business done in Alabama. These securities were intangible property, the value of which did not arise from the fact that they were held in trust in Alabama. Such securities would have possessed precisely the same value whether in trust in Alabama or elsewhere and also if not held in any trust. When adversary counsel state on page 10 of their brief that the Alabama trustee was, in reality, an agent having possession

of certain stocks and bonds, they bring the present case squarely within the authority of *Blodgett* v. *Silberman, supra,* and they must ask this Court to overrule that case if they are to prevail.

Safe Deposit and Trust Co. v. *Virginia,* 280 U. S., 83, also relied upon by appellants, is distinguishable on grounds pointed out in the opinion below. (R., pp. 53-54.) We also stress the facts repeatedly emphasized in the opinion of this Court that no person in the state of residence of the equitable owners had any present right to enjoyment in the trust or any power to control the trust or any power to remove it from the state where the trustee was domiciled. These distinctions are so obvious as to render it unnecessary to consider whether the fact that this was an *ad valorem* tax case, and not a succession tax case, is important. In passing, it may be noted that several courts and text authorities have said that decisions relating to the situs of property for the purpose of direct taxation are not controlling in determining the situs for the purpose of an inheritance tax; but we see no reason to elaborate upon this question and upon whether it is practicably tenable if not strictly logical.

Senior v. *Braden,* 295 U. S., 422, also relied upon by appellants, held that a state is without power to levy an *ad valorem* tax upon land trust certificates representing interests in various parcels of land, some of which were outside the state. The state had sought to levy the tax as one upon intangible property of a resident. The basis of the holding is that the thing sought to be subjected to taxation is really an interest in land beyond the jurisdiction of the Court.

Burnet v. *Brooks,* 288 U. S., 378, and *Hutchison* v. *Ross,* 262 N. Y., 381, are not urged by appellants as authority because of the holding but there is merely an effort to use certain general language of the opinion in support of the

contention now made by distinguished adversary counsel. We submit that the language relied upon is not even a dictum in support of their position.

Matter of Brown, 274 N. Y., 10, is cited but not discussed by appellants. In view of the fact that the writ of *certiorari* has been granted by this Court and that this case is to be heard approximately at the same time as the case at bar we shall not comment upon the distinction betweer it and the case at bar. It is noteworthy that the Court of Appeals of New York did not regard itself as deciding the case at bar but regarded such a case as clearly distinguishable from the facts presented to it for decision.

BLANK

PAGE

BLANK

PAGE

CONCLUSION.

We submit that the decree of the Supreme Court of Tennessee ought to be affirmed (1) for the reason that under the facts presented there was merely a testamentary transfer by a resident of Tennessee of stocks and bonds belonging to her and physically kept in Alabama; (2) for the reason that, assuming there to be a testamentary transfer of an interest in a trust, the mere deposit of securities with a trustee in another state does not give them a business situs within the meaning of the one *possible* exception to the general rule *mobilia sequuntur personam;* and (3) for the reason that, assuming the possible exception to the general rule now to be presented so as to require a decision of the question heretofore expressly reserved, such question ought to be decided in favor of the state of domicile.

Respectfully submitted,

EDWIN F. HUNT,
Counsel for Appellee.

ROY H. BEELER,
Attorney General of Tennessee.

DUDLEY PORTER, JR.,
Of Counsel.

I hereby certify that three copies of the foregoing Brief and Argument were mailed, postage prepaid, to Ray Rushton, Bell Building, Montgomery, Alabama, of counsel for appellants, on December 31, 1938.

EDWIN F. HUNT,
Counsel for Appellee.

BLANK

PAGE

SUPREME COURT OF THE UNITED STATES.

No. 339.—October Term, 1938.

John C. Curry, as State Tax Commissioner of the State of Alabama, et al., Appellants,
vs.
George F. McCanless, as Commissioner of Finance and Taxation of the State of Tennessee.

Appeal from the Supreme Court of the State of Tennessee.

[May 29, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

The questions for decision are whether the States of Alabama and Tennessee may each constitutionally impose death taxes upon the transfer of an interest in intangibles held in trust by an Alabama trustee but passing under the will of a beneficiary decedent domiciled in Tennessee; and which of the two states may tax in the event that it is determined that only one state may constitutionally impose the tax.

Decedent, a domiciled resident of Tennessee, by trust indenture transferred certain stocks and bonds upon specified trusts to Title Guarantee Loan & Trust Company, an Alabama corporation doing business in that state. So far as now material, the indenture provided that the net income of the trust property should be paid over to decedent during her lifetime. She reserved the power to remove the trustee and substitute another, which was never done; the power to direct the sale of the trust property and the investment of the proceeds; and the power to dispose of the trust estate by her last will and testament, in which event it was to be "handled and disposed of as directed" in her will. The indenture provided further that in default of disposition by will the property was to be held in trust for the benefit of her husband, son, and daughter. Until decedent's death the trust was administered by the trust company in Alabama and the paper evidences of the intangibles held by the trustee were at all times located in Alabama.

By her last will and testament decedent bequeathed the trust property to the trust company in trust for the benefit of her hus-

band, son, and daughter, in different amounts and by different estates from those provided for by the trust indenture, with remainder interests over to the children of the son and the daughter respectively, and to his wife and her husband. By her will testatrix appointed a Tennessee trust company executor "as to all property which I may own in the State of Tennessee at the time of my death", and an Alabama trust company executor "as to all property which I may own in the State of Alabama and also as to all property which I may have the right to dispose of by last will and testament in said state". The will has been probated in Tennessee and in Alabama, and letters testamentary have issued to the two trust companies named as executors in the will.

The present suit was brought by the two executors in a chancery court of Tennessee against appellants, comprising the State Tax Commission of Alabama, and appellee, Commissioner of Finance and Taxation of the State of Tennessee, who are charged with the duty of collecting inheritance or succession taxes in their respective states. The bill of complaint prayed a declaratory judgment pursuant to the Tennessee Declaratory Judgments Act, Tennessee Code, 1932, §§ 8835-8847, determining what portions of the estate of decedent are taxable by the State of Tennessee and what portions by the State of Alabama. Appellants and appellee appeared and by their answers and by stipulation recited in detail the facts already stated and admitted that the taxing officials of each state had imposed or asserted the right to impose an inheritance or death transfer tax on the trust property passing under decedent's will.

The chancery court of Tennessee decreed that the State of Alabama could lawfully impose the tax and that the inheritance tax law of Tennessee violated the Fourteenth Amendment in so far as it purported to impose a tax measured by the trust property disposed of by decedent's will. The Supreme Court of Tennessee reversed, and entered its decree declaring the trust property disposed of by decedent's will to be "taxable in Tennessee and not taxable in Alabama for purposes of death succession or transfer taxes". — Tenn. —. The case comes here on an appeal from this decree taken by the taxing officials of Alabama under § 237(a) of the Judicial Code, 28 U. S. C. § 344(a).

Alabama has assessed a state inheritance tax on the trust property pursuant to Article XII, c. 2, of its General Revenue Act. Alabama Acts, 1935, pp. 434 *et seq.* No transfer tax has been assessed upon the property by the Tennessee taxing officials, but they

assert the right under the Tennessee statute to tax the transfer under decedent's will of the trust property. Sections 1259 and 1260 of the Tennessee Code of 1932 impose a tax upon the transfer at death by a resident of the state of his intangible property wherever located, including transfers under powers of appointment.

Both the court of chancery of Tennessee and the Supreme Court of Tennessee, conceiving that the Fourteenth Amendment requires the transmission at death of intangibles to be taxed at their "situs" and there only, considered that the primary question for determination was the situs or location to be attributed to the intangibles of the trust estate at the time of decedent's death. After considering all of the relevant factors, the one court concluded that the situs of the intangibles was in Alabama, the other that it was in Tennessee. Despite the impossibility in the circumstances of this case of attributing a single location to that which has no physical characteristics and which is associated in numerous intimate ways with both states, both courts have agreed that the Fourteenth Amendment compels the attribution to be made and that, once it is established by judicial pronouncement that the intangibles are in one state rather than the other, the due process clause forbids their taxation in any other.

The doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state has received support to the limited extent that it was applied in *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586; *First National Bank* v. *Maine,* 284 U. S. 312. Still more recently this Court has declined to give it completely logical application.[1] It has never been pressed to the extreme now urged upon us, and we think that neither reason nor authority requires its acceptance in the circumstances of the present case.

That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located for purposes of the jurisdiction of a court to make disposition of putative rights in them, for purposes of conflict of laws, and for purposes of taxation, is a doctrine generally ac-

[1] See, in the case of income taxation, Lawrence *v.* State Tax Comm'n, 286 U. S. 276; New York ex rel. Cohn *v.* Graves, 300 U. S. 308; Guaranty Trust Co. *v.* Virginia, 305 U. S. 19; cf. Senior *v.* Braden, 295 U. S. 422, 431-432. And in the case of taxation of shares of stock, see Corry *v.* Baltimore, 196 U. S. 466; First Bank Stock Corp. *v.* Minnesota, 301 U. S. 234, 239-240; Schuylkill Trust Co. *v.* Pennsylvania, 302 U. S. 506, 514-516.

cepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since.[2] Originating, it has been thought, in the tendency of the mind to identify rights with their physical subjects, see Salmond, Jurisprudence (2nd ed.) 398, its survival and the consequent cleavage between the rules of law applicable to tangibles and those relating to intangibles are attributable to the exclusive dominion exerted over the tangibles themselves by the government within whose territorial limits they are found. *Green* v. *Van Buskirk,* 7 Wall. 139, 150; *Pennoyer* v. *Neff,* 95 U. S. 714; *Arndt* v. *Griggs,* 134 U. S. 316, 320-321. See *McDonald* v. *Mabee,* 243 U. S. 90, 91; cf. *Harris* v. *Balk,* 198 U. S. 215, 222; *Frick* v. *Pennsylvania, supra,* 497. The power of government and its agencies to possess and to exclude others from possessing tangibles, and thus to exclude them from enjoying rights in tangibles located within its territory, affords adequate basis for an exclusive taxing jurisdiction. When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others. Other states have been said to be without jurisdiction and so without constitutional power to tax tangibles if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax. See *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 202; *Frick* v. *Pennsylvania,* 268 U. S. 473, 489 *et seq.*[3]

---

[2] Green *v.* Van Buskirk, 5 Wall. 307; 7 Wall. 139; Pennoyer *v.* Neff, 95 U. S. 714; Arndt *v.* Griggs, 134 U. S. 316; Fall *v.* Eastin, 215 U. S. 1; Olmsted *v.* Olmsted, 216 U. S. 386; United States *v.* Guaranty Trust Co., 293 U. S. 340, 345-346; Paddell *v.* New York, 211 U. S. 446; St. Louis *v.* Ferry Co., 11 Wall. 423, 430; Frick *v.* Pennsylvania, 268 U. S. 473; see Story, Conflict of Laws (8th ed.), §§ 550, 551; Dicey, Conflict of Laws (5th ed.), pp. 418, *et seq.,* 583 *et seq.,* 606 *et seq.;* 1 Beale, Conflict of Laws, § 48.1 *et seq.;* American Law Institute, Restatement of Conflict of Laws, §§ 48, 49; 2 Cooley, Taxation (4th ed.), §§ 447, 451.

[3] But there are many legal interests other than conventional ownership which may be created with respect to land of such a character that they may be constitutionally subjected to taxation in states other than that where the land is situated. No one has doubted the constitutional power of a state to tax its domiciled residents on their shares of stock in a foreign corporation whose only property is real estate located elsewhere, Darnell *v.* Indiana, 226

Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. See *Chicago, R. I. & P. Ry.* v. *Sturm*, 174 U. S. 710, 716; *Harris* v. *Balk*, 198 U. S. 215, 222. Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived. These are not in any sense fictions. They are indisputable realities.

The power to tax "is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation." *McCulloch* v. *Maryland*, 4 Wheat. 316, 429. But this does not mean that the sovereign power of the state does not extend over intangibles of a domiciled resident because they have no physical location within its territory, or that its power to tax is lost because we may choose to say they are located elsewhere. A jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent. From

U. S. 390; Hawley *v.* Malden, 232 U. S. 1; cf. Kidd *v.* Alabama, 188 U. S. 730; Corry *v.* Baltimore, 196 U. S. 466; Cream of Wheat Co. *v.* County of Grand Forks, 253 U. S. 325, 329; Schuylkill Trust Co. *v.* Pennsylvania, 302 U. S. 506, 514-516, or to tax a valuable contract for the purchase of land or chattels located in another state, see Citizens National Bank *v.* Durr, 257 U. S. 99, 108; cf. Gish *v.* Shaver, 140 Ky. 647, 650; Golden *v.* Munsinger, 91 Kan. 820, 823; Marquette *v.* Michigan Iron & Land Co., 132 Mich. 130, or to tax a mortgage of real estate located without the state, even though the land affords the only source of payment, see Kirtland *v.* Hotchkiss, 100 U. S. 491; cf. Savings and Loan Society *v.* Multnomah County, 169 U. S. 421; Bristol *v.* Washington County, 177 U. S. 133; Paddell *v.* New York, 211 U. S. 446. Each of these legal interests finds its only economic source in the value of the land, and the rights which are elsewhere subjected to the tax can be brought to their ultimate fruition only through some means of control of the land itself. But the means of control may be subjected to taxation in the state of its owner whether it be a share of stock or a contract or a mortgage. There is no want of jurisdiction to tax these interests where they are owned in the sense that the state lacks power to appropriate them to the payment of the tax. No court has condemned such action as so capricious, arbitrary or oppressive as to bring it within the prohibition of the Fourteenth Amendment, for it is universally recognized that these interests are of themselves in some measure clothed with the legal incidents of property enjoyed by their owner, in the state where he resides, through the benefit and protection of its laws.

the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government, have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state, or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax. *Carpenter* v. *Pennsylvania*, 17 How. 456; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Hawley* v. *Malden*, 232 U. S. 1; *Bullen* v. *Wisconsin*, 240 U. S. 625; *Cream of Wheat Co.* v. *County of Grand Forks*, 253 U. S. 325; *Blodgett* v. *Silberman*, 277 U. S. 1; *Farmers Loan & Trust Co.* v. *Minnesota, supra; Baldwin* v. *Missouri, supra; Beidler* v. *South Carolina*, 282 U. S. 1; *First National Bank* v. *Maine, supra; Virginia* v. *Imperial Coal Sales Co.*, 293 U. S. 15; *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506.

In cases where the owner of intangibles confines his activity to the place of his domicile it has been found convenient to substitute a rule for a reason, cf. *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 313; *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234, 241, by saying that his intangibles are taxed at their situs and not elsewhere, or, perhaps less artifically, by invoking the maxim *mobilia sequuntur personam, Blodgett* v. *Silberman, supra; Baldwin* v. *Missouri, supra*, which means only that it is the identity or association of intangibles with the person of their owner at his domicile which gives jurisdiction to tax. But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax. Whether we regard the right of a state to tax as founded on power over the object taxed, as declared by Chief Justice Marshall in *McCulloch* v. *Maryland, supra*, through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protection conferred by the taxing sovereignty, or both, it is undeniable that the state of domicile is not deprived, by the

taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles. Shares of corporate stock may be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls; and income may be taxed both by the state where it is earned and by the state of the recipient's domicile.[4] Protection, benefit, and power over the subject matter are not confined to either state. The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business. *New Orleans* v. *Stempel,* 175 U. S. 309; *Bristol* v. *Washington County,* 177 U. S. 133; *Board of Assessors* v. *Comptoir National,* 191 U. S. 388; *Metropolitan Life Insurance Co.* v. *New Orleans,* 205 U. S. 395; *Liverpool Ins. Co.* v. *Board,* 221 U. S. 346; *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193; cf. *Blodgett* v. *Silberman, supra; Baldwin* v. *Missouri, supra.* But taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles. *Cream of Wheat Co.* v. *County of Grand Forks, supra,* 329;[5] see *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54.

The practical obstacles and unwarranted curtailments of state power which may be involved in attempting to prevent the taxation of diverse legal interests in intangibles in more than a single place, through first ascribing to them a fictitious situs and then invoking the prohibition of the Fourteenth Amendment against their taxation elsewhere, are exemplified by the circumstances of the present case. Here, for reasons of her own, the testatrix, although domiciled in Tennessee and enjoying the benefits of its laws, found it advantageous to create a trust of intangibles in Alabama by vesting legal title to the intangibles and limited powers of control over them in an Alabama trustee. But she also provided that by resort to her power to dispose of property by will, conferred upon her by the law of the domicile, the trust could be terminated and the property pass under the will. She thus created two sets of legal relationships resulting in distinct intangible rights, the one embodied in the legal ownership by the

[4] See Footnote 1, *ante.*

[5] See also Footnote 2, *ante.*

Alabama trustee of the intangibles, the other embodied in the equitable right of the decedent to control the action of the trustee with respect to the trust property and to compel it to pay over to her the income during her life, and in her power to dispose of the property at death.

Even if we could rightly regard these various and distinct legal interests, springing from distinct relationships, as a composite unitary interest and ascribe to it a single location in space, it is difficult to see how it could be said to be more in one state than in the other and upon what articulate principle the Fourteenth Amendment could be thought to have withdrawn from either state the taxing jurisdiction which it undoubtedly possessed before the adoption of the Amendment by conferring on one state, at the expense of the other, exclusive jurisdiction to tax. See *Paddell* v. *City of New York,* 211 U. S. 446, 448. If the "due process" of the Fifth Amendment does not require us to fix a single exclusive place of taxation of intangibles for the benefit of their foreign owner, who is entitled to its protection, *Burnet* v. *Brooks,* 288 U. S. 378; cf. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489, the Fourteenth can hardly be thought to make us do so here, for the due process clause of each amendment is directed at the protection of the individual and he is entitled to its immunity as much against the state as against the national government.

If taxation is but a means of distributing the cost of government among those who are subject to its control and who enjoy the protection of its laws, see *New York ex rel. Cohn* v. *Graves, supra,* 313; *First Bank Stock Corp.* v. *Minnesota, supra,* 241, legal ownership of the intangibles in Alabama by the Alabama trustee would seem to afford adequate basis for imposing on him a tax measured by their value. We can find no more ground for saying that the Fourteenth Amendment relieves it, or the property which it holds and administers in Alabama, from bearing that burden, than for saying that they are constitutionally immune from paying any other expense which normally attaches to the administration of a trust in that state. This Court has never denied the constitutional power of the trustee's domicile to subject them to property taxation. *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83; see cases collected in 30 Columbia Law Rev. 530; 2 Cooley, Taxation (8th ed.), § 602. And since Alabama may lawfully tax the property in the trustee's hands, we perceive no ground for saying that the Fourteenth Amendment forbids the

state to tax the transfer of it or an interest in it to another merely because the transfer was effected by decedent's testamentary act in another state.

No more plausible ground is assigned for depriving Tennesscee of the power to tax in the circumstances of this case. The decedent's power to dispose of the intangibles was a potential source of wealth which was property in her hands from which she was under the highest obligation, in common with her fellow citizens of Tennessee, to contribute to the support of the government whose protection she enjoyed. Exercise of that power, which was in her complete and exclusive control in Tennessee, was made a taxable event by the statutes of the state. Taxation of it must be taken to be as much within the jurisdiction of the state as taxation of the transfer of a mortgage on land located in another state and there subject to taxation at its full value. See *Kirtland* v. *Hotchkiss, supra;* cf. *Paddell* v. *City of New York, supra.*

For purposes of taxation, a general power of appointment, of which the testatrix here was both donor and donee, has hitherto been regarded by this Court as equivalent to ownership of the property subject to the power. *Chanler* v. *Kelsey*, 205 U. S. 466; *Bullen* v. *Wisconsin, supra,* 630; *Chase National Bank* v. *United States,* 278 U. S. 327, 338; see Gray, Rule Against Perpetuities (3d ed. 1916), § 524.[6] Whether the appointee derives title from the donor, under the common law theory, or from the donee by virtue of the exercise of the power, is here immaterial. In either event the trustee's title under the will was derived from decedent, domiciled in Tennessee. Cf. *Wachovia Trust Co.* v. *Doughton,* 272 U. S. 567. There is no conflict here between the laws of the two states affecting the transmission of the trust property. The title of the trustee under the original Alabama trust came to an end upon the exercise of the testatrix's power of appointment; and although the trustee after her death still had title to the securities, it was in by a new title as legatee under her will, and a new beneficial interest was created, both derived through the exercise of her power of disposition. The resulting situation was no different from what it would have been if she had bequeathed the intangibles upon a new trust to a new and different trustee, either within or without the state of Alabama. So far as the power of Tennessee to tax the exercise of the power of appointment is concerned, there is no substan-

[6] No comparable right or power resided in the beneficiaries upon whom a tax was sought to be levied in Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 91.

tial difference between the present case and any other case in which at the moment of death the evidences of intangibles passing under the will of a decedent domiciled in one state are physically present in another. See *Blodgett* v. *Silberman, supra; Baldwin* v. *Missouri, supra.*

It has hitherto been the accepted law of this Court that the state of domicile may constitutionally tax the exercise or non-exercise at death of a general power of appointment, by one who is both donor and donee of the power, relating to securities held in trust in another state. *Bullen* v. *Wisconsin, supra.* If it be thought that it is identity of the intangibles with the person of the owner at the place of his domicile which gives power over them and hence "jurisdiction to tax", and this is the reason underlying the maxim *mobilia sequuntur personam*, it is certain here that the intangibles for some purposes are identified with the trustee, their legal owner, at the place of its domicile and that in another and different relationship and for a different purpose—the exercise of the power of disposition at death, which is the equivalent of ownership—they are identified with the place of domicile of the testatrix, Tennessee. In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there. She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both.

We can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or authority for saying that it prohibits either state, in the circumstances of this case, from laying the tax. On the contrary this Court, in sustaining the tax at the place of domicile in a case like the present, has declared that both the decedent's domicile and that of the trustee are free to tax. *Bullen* v. *Wisconsin, supra,* 631; cf. *Keeney* v. *New York*, 222 U. S. 525, 537; *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509. That has remained the law of this Court until the present moment, and we see no reason for discarding it now. We find it impossible to say that taxation of intangibles can be reduced in every case to the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all the complex legal relationships which may be entered into between persons. This is the case because in point of actuality those interests may be too diverse in their relationships to various taxing jurisdictions

to admit of unitary treatment without discarding modes of taxation long accepted and applied before the Fourteenth Amendment was adopted, and still recognized by this Court as valid. See *Paddell* v. *New York, supra,* 448. The Fourteenth Amendment cannot be carried out with such mechanical nicety without infringing powers which we think have not yet been withdrawn from the states. We have recently declined to press to a logical extreme the doctrine that the Fourteenth Amendment may be invoked to compel the taxation of intangibles by only a single state by attributing to them a situs within that state.[7] We think it cannot be pressed so far here.

If we enjoyed the freedom of the framers it is possible that we might, in the light of experience, devise a more equitable system of taxation than that which they gave us. But we are convinced that that end cannot be attained by the device of ascribing to intangibles in every case à locus for taxation in a single state despite the multiple legal interests to which they may give rise and despite the control over them or their transmission by any other state and its legitimate interest in taxing the one or the other. While fictions are sometimes invented in order to realize the judicial conception of justice, we cannot define the constitutional guaranty in terms of a fiction so unrelated to reality without creating as many tax injustices as we would avoid and without exercising a power to remake constitutional provisions which the Constitution has not given to the courts. See *Bristol* v. *Washington County, supra,* 145; *Kidd* v. *Alabama,* 188 U. S. 730, 732, quoted with approval in *Hawley* v. *Malden, supra,* 13; *Bullen* v. *Wisconsin, supra,* 630; *Fidelity & Columbia Trust Co.* v. *Louisville, supra,* 58; *Cream of Wheat Co.* v. *County of Grand Forks, supra,* 330.

So far as the decree of the Supreme Court of Tennessee denies the power of Alabama to tax, it is

Reversed.

Mr. Justice REED concurs in this opinion except as to the statement that "taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles." Upon this point he reserves his conclusion.

---

[7] See Footnote 1, *ante.*

BLANK

PAGE

SUPREME COURT OF THE UNITED STATES.

No. 339.—October Term, 1938.

John C. Curry, as State Tax Commissioner of the State of Alabama, et al., Appellants,
vs.
George F. McCanless, as Commissioner of Finance and Taxation of the State of Tennessee.

Appeal from the Supreme Court of the State of Tennessee.

[May 22, 1939.]

Mr. Justice Butler, dissenting.

The sole question is whether, on the facts about to be stated, the Tennessee inheritance tax law, consistently with the due process clause of the Fourteenth Amendment, may be extended to intangible personal property evidenced by certificates of stock and bonds held in Alabama.

The suit was brought in a chancery court of Tennessee under the declaratory judgments act of that State.[1] Complainants were the Nashville Trust Company, a Tennessee corporation appointed by the will of Mrs. Grace C. Scales as executor for Tennessee, and the Title Guarantee Loan & Trust Company, which will be referred to as the Birmingham trust company, an Alabama corporation appointed as executor for that State. Defendants were the Commissioner of Finance and Taxation of Tennessee, and the members of the Alabama Tax Commission. The bill prayed that the court determine what portions of the estate are taxable by Tennessee and what portions are taxable by Alabama. The Tennessee commissioner filed answer praying declaration and decree that the securities held in Alabama are subject to the inheritance tax law of Tennessee.[2] The members of the Alabama commission filed their

[1] Tennessee Code, 1932, §§ 8835-8847.

[2] Tennessee Code, 1932: "Section 1259. Subdivision 1. . . . A tax is imposed . . . upon transfers, in trust or otherwise, of the following property, or any interest therein or accrued income therefrom: (a) When the

answer and a cross-bill praying decree in favor of that State and against the Birmingham trust company for the tax claimed under the laws of Alabama.[3]

The parties stipulated that the facts are as stated in the pleadings. In substance they are as follows:

At all times involved in this case, Mrs. Scales was a resident of and domiciled in Tennessee. Her brother, formerly living in Alabama, died in 1905 leaving a will that bequeathed to the Birmingham trust company stocks and bonds issued by Alabama corporations to be held in trust for the use and benefit of his widow and at her death to be delivered to Mrs. Scales. The widow died in 1917. Immediately, December 29, 1917, and without taking any of them from the possession of the trust company, Mrs. Scales executed jointly with it an indenture covering the stocks and bonds of which she had become owner under her brother's will.

By paragraph 1, she transferred 50 bonds to the trust company as trustee for the use and benefit of her son and directed that it hold and manage the property and pay net income to him during his life, and that, subject to his power of disposition by will, all property belonging to the trust at the time of his death should go to his children. By paragraph 2, she transferred to the same company 50 other bonds to be held in trust for the benefit of her daughter subject to trusts, conditions, and power of testamentary appointment by her daughter like those specified in the provisions creating the trust for her son.

By paragraph 3, she transferred to the same trustee the balance of the property by it to be held in trust and managed for specified

---

transfer is from a resident of this state . . . (3) All intangible personal property . . . Section 1260. Subdivision 2. . . . The transfers enumerated in subdivision 1. . . . shall be taxable if made—(a) By a will . . ."

[3] Alabama General Revenue Act, approved July 10, 1935, Art. XII, c. 2 (Acts 1935, pp. 434 *et seq.*): Section 347.1: " . . . there is hereby levied and imposed upon all net estates passing by will, devise, or under the intestate laws of the State of Alabama, or otherwise, which are lawfully subject to the imposition of an estate tax by the State of Alabama, a tax equal to the full amount of State tax paid permissible when levied by and paid to the State of Alabama as a credit or deduction in computing any federal estate tax payable by such estate according to the Act of Congress in effect, on the date of the death of the decedent, taxing such estate, with respect to the items subject to taxation in Alabama. . . ." Section 347.7: " . . . all of the provisions of this Chapter shall be applicable to so much of the estates of non-resident decedents as is subject to estate tax under the Act of Congress in effect at the time of the death of decedent as consists of real estate or tangible personal property located within this State, or other item of property or interest therein lawfully subject to the imposition of an estate tax by the State of Alabama. . . ."

uses and purposes and upon terms and conditions in substance as follows: (a) She directed the trustee to pay the income to her while she lived. (b) She reserved the right by will to dispose of all the trust property. (c) She directed that if she made no disposition by will the trustee should pay $200 per month out of income to her husband during his life and the balance of income to her son and daughter during their lives; that the child or children of either, if dead, should receive the share of income which the parent would have received if living; that one-half of the property in the trust at the time of her death be transferred to the trust created for her son; and that the other half be transferred to the trust created for her daughter. (d) She reserved power at any time that she deemed income insufficient for her support to direct the trustee to sell a part of the trust property and to give her the amount received for it, and retained the right to direct transfer to her son or daughter of any portion of the trust property, and (e) the right to direct investments. She retained authority to remove the trustee and to appoint a successor. As to nearly all the property held in trust under paragraph 3, Mrs. Scales, her son, daughter, and the trustee, January 11, 1929, executed a writing releasing the power reserved to encroach on or dispose of corpus.

January 1, 1926, Mrs. Scales exerted the power by will to dispose of the trust property. Item two recites that she had reserved the right to dispose by will of property conveyed to the trustee under paragraph 3 of the trust agreement and provides: "Now, therefore, desiring to exercise the right to dispose of the said trust property, I do hereby give, devise, and bequeath all of the property in custody of said Title Guarantee Loan & Trust Company . . . at the time of my death to the said company, as trustee, the same to be held by it in trust upon the uses and trusts, terms, conditions, and limitations hereinafter set forth in this item of my will."

Section one of that item directs that from the trust estate there shall be set aside property of the value of $100,000 to be held in trust as there specified for her daughter and her daughter's children. Section two makes like provision for her son and his children. Section three directs that, after the trust property shall be set aside as specified in sections one and two, the balance in the hands of the trustee shall be given in equal shares to her daughter and son to be theirs absolutely.

An amendment to the answer of the members of the Alabama Tax Commission alleges, and by stipulation the other parties admit, that from the trust indenture it fully appears that the title, possession and control of the securities passed completely to the Birmingham trust company and that such was the status of the securities at the time of the death of Mrs. Scales. That amendment also alleges, and the stipulation admits, that she never exercised the right reserved to her to remove the trustee and that the trust property could not have been removed from Alabama except upon an order of a circuit court and in compliance with the statutes of that State.[4]

The chancery court found that at the time of the death of Mrs. Scales the securities in question "had a legal situs analogous to the situs of tangible personal property in the State of Alabama." It decreed that Alabama may legally impose upon them a death transfer or succession tax and that in so far as the inheritance tax law of Tennessee attempts to impose the tax claimed by that State it violates the due process clause of the Fourteenth Amendment.

The state supreme court reversed the chancery court. It held that the securities were not so used in Alabama as to give them a situs there; that when Mrs. Scales died the situation was the same as though there never had been a trust; and that the property passed under the will as her absolute property. It entered a decree declaring the property taxable in Tennessee and not taxable in Alabama.

The Tennessee commissioner and the members of the Alabama commission respectively claim the right to impose an inheritance or death succession tax based upon the value of all the property held in the trust at the time of the death of Mrs. Scales. Rightly the parties agreed and the state courts assumed that, consistently with the due process clause of the Fourteenth Amendment, both States may not impose transfer taxes in respect of the same property. *Frick* v. *Pennsylvania,* 268 U. S. 473, 489-494. *Farmers Loan Co.* v. *Minnesota,* 280 U. S. 204, 210-212. *Baldwin* v. *Missouri,* 281 U. S. 586, 591. *Beidler* v. *So. Car. Tax Commission,* 282 U. S. 1, 7-8. *First National Bank* v. *Maine,* 284 U. S. 312, 328. *City Bank Co.* v. *Schnader,* 293 U. S. 112, 116-117. See *Burnet* v. *Brooks,* 283 U. S. 378, 401-402; *Senior* v. *Braden,* 295 U. S. 422, 432; *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 209-210; *N. Y. ex rel. Whitney* v. *Graves,* 299 U. S. 366, 372; *N. Y. ex rel. Cohn* v.

[4] Alabama Code, 1928, §§ 10418-10421.

Graves, 300 U. S. 308, 314-315; *Worcester County Co.* v. *Riley,* 302 U. S. 292, 297, 298. No distinction is suggested between the securities covered by the relinquishment, January 11, 1929, of the right reserved to encroach upon and to direct transfer from the corpus and the small part to which the relinquishment did not extend. And, as the parties and the state courts have treated all alike, this Court may decide upon title and taxability as if the relinquishment covered all.

The parties agree that, upon execution of the indenture, title, possession, and control passed completely to the trustee and so continued until the death of Mrs. Scales. There being no provision authorizing revocation, the grant was irrevocable. Perry on Trusts and Trustees (7th ed.) § 104. Bogert, Trusts and Trustees, § 993. *Keyes* v. *Carleton,* 141 Mass. 45, 49. *Ewing* v. *Jones,* 130 Ind. 247, 254-255. *Savings Institution* v. *Hathorn,* 88 Me. 122, 128-129. *Wilson* v. *Anderson,* 186 Pa. 531, 537. *Hellman* v. *McWilliams,* 70 Cal. 449, 453. *Strong* v. *Weir,* 47 S. C. 307, 323. Unquestionably it presently vested full legal and equitable title in the trustee and beneficiaries, subject to be divested only by the exertion by Mrs. Scales of her power of appointment by will. *Coolidge* v. *Long,* 282 U. S. 582, 597. *Marvin* v. *Smith,* 46 N. Y. 571, 575. *Carroll* v. *Smith,* 99 Md. 653, 658 *et seq.* *Boone* v. *Davis,* 64 Miss. 133, 140. That power did not amount to an estate or interest in the trust property. *United States* v. *Field,* 255 U. S. 257, 263. *Porter* v. *Commissioner,* 288 U. S. 436, 441. All doubt as to that is precluded by the clause of the indenture which provides that in the absence of disposition by her will the property shall continue to be held in trust for purposes there specified.

The reserved authority to direct investment contemplates action as trustee and not control as owner. *Reinecke* v. *Trust Co.,* 278 U. S. 339, 346-347. The authority to remove the trustee and to appoint a successor detracts nothing from the plenary grant of title. See *Bowditch* v. *Banuelos,* 1 Gray 220, 230. When read as it must be in connection with the provisions of the Alabama statute above referred to, that provision of the indenture does not reserve power to remove the trust securities from the State of Alabama.

As the death of Mrs. Scales and taking effect of her will were coincident, the legal title remained in the trustee. The purposes Mrs. Scales intended to effect by the trusts defined by her will are

like those she intended to serve by the trusts created by the indenture which, in absence of will, were to continue after death. Stripped of mere legalism, and taken according to substance, the will operated to amend and continue the trusts created by the indenture. Questions of power to tax are governed by the substance of things rather than by technical rules, concerning title. *Tyler* v. *United States*, 281 U. S. 497, 503.

It follows that, save her right to income, Mrs. Scales, after her relinquishment, January 11, 1929, and at the time of her death, had no estate or interest in the securities held by the trustee. There is no basis for application of the fiction *mobilia sequuntur personam*. *Wachovia Trust Co.* v. *Doughton*, 272 U. S. 567, 575. *Brooke* v. *Norfolk*, 277 U. S. 27, 29. *Safe Deposit & T. Co* v. *Virginia*, 280 U. S. 83, 92, 94. *McMurtry* v. *The State*, 111 Conn. 594. *Estate of Bowditch*, 189 Cal. 377. *Matter of Canda*, 197 App. Div. 597. Cf. *Bullen* v. *Wisconsin*, 240 U. S. 625. Tennessee may not impose the inheritance tax claimed in this suit by its Commissioner of Finance and Taxation.

Moreover, if contrary to the indenture as above construed, it should be held that at the time of her death Mrs. Scales in addition to having power of appointment by will owned an interest in the trust property, Tennessee would nevertheless be without power to impose a tax on the transfer of that interest because the intangibles in question had no situs in that State.

Intangibles, like tangibles, may be so held and used outside the State of the domicil of the owner as to become taxable in the State where kept. See e.g. *New Orleans* v. *Stempel*, 175 U. S. 309. *Bristol* v. *Washington County*, 177 U. S. 133, 143 *et seq.* *Board of Assessors* v. *Comptoir National*, 191 U. S. 388. *Scottish Union & Nat. Ins. Co.* v. *Bowland*, 196 U. S. 611, 619-620. *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395, 402. *Liverpool &c. Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, 353. The general rule of *mobilia sequuntur personam* must yield to the established fact of legal ownership, actual presence and control in a State other than that of the domicil of the owner. The phrase "business situs" as used to support jurisdiction of a State other than that of the domicil of the owner to impose taxes on intangible personal property is a metaphorical expression of vague signification; its meaning is not limited to investment or actual use as an integral part of a busi-

ness or activity, but may extend to the execution of trusts such as those created by the indenture and imposed on the trustee in this case. *DeGanay* v. *Lederer,* 250 U. S. 376, 381-382. *New York ex rel. Whitney* v. *Graves, supra,* 372 *et seq.* *Wheeling Steel Corp.* v. *Fox, supra,* 211. *First Bank Corp.* v. *Minnesota,* 301 U. S. 234.

The stock certificates, bonds or other documents evidencing the intangibles constituting the trust property were never held in Tennessee. Neither their issue or validity nor the enforcement or transfer, inter vivos or from the dead to the living, of any right attested or supported by them was at all dependent on the laws of that State.[5] From the beginning, the trust estate has been under the protection of, and necessarily the trusts have been and are being executed under, the laws of Alabama unaffected by those of any other State. See *Hutchison* v. *Ross,* 262 N. Y. 381, 394; *Sewall* v. *Wilmer,* 132 Mass. 131, 137.

At least since 1917, Mrs. Scales had no power to remove the trust or any of the trust property from Alabama. Exertion of any right or power reserved to her by the indenture was dependent on the laws of Alabama and not upon or subject to those of Tennessee, where she happened to have her domicil. *Wachovia Trust Co.* v. *Doughton, ubi supra.* Subject to the laws of Alabama, all transactions in which the trust properties were capable of being used were identified with that State. The securities, held there not only for safekeeping but as well for collection of income and principal, and subject to sale and reinvestment of proceeds, could not be more completely localized anywhere. *DeGanay* v. *Lederer, ubi supra.*

The judgment of the Supreme Court of Tennessee should be reversed and the case remanded to that court for further proceedings in accordance with this opinion.

Mr. Chief Justice HUGHES, Mr. Justice MCREYNOLDS and Mr. Justice ROBERTS join in this opinion.

---

[5] See footnote 4.